Office-Supreme Court, U.S.
FILED
APR
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1001

NATIONAL STARCH PRODUCTS, INC.,
Petitioner,

vs.

THE UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

CHARLES M. PRICE,
THADDEUS S. SNELL,
ROBERT W. WRIGHT, JR.,
of
SPRAY, PRICE, TOWNSEND & CUSHMAN,
134 South LaSalle Street,
Chicago 3, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	6
Reasons for Granting the Writ	8
Conclusion	15
Appendix A	i
Appendix B	vii

CITATIONS.

Cases.

Arthur v. Unkart, 96 U. S. 118 (1877) . . 8, 9, 10, 11, 12-13, 15

Atlantic Aluminum & Metal Distributors, Inc. v. United States, 47 C. C. P. A. 88 (C. A. D. 735) 8

Davies v. Arthur, 96 U. S. 148 (1877) 14-15

Davies et al. v. Miller et al., 91 F. 647 (C. C. A. 2nd Cir., 1898) 9

Fisk v. Seeberger, 38 F. 718 (D. C. N. D. Ill., 1889) . . 9

W. T. Grant Company v. United States, 38 C. C. P. A. 57 (C. A. D. 440) 9

Lowenthal Trimming Corp. v. United States, 39 C. C. P. A. 149 (C. A. D. 477) 9

McCandless v. Furlaud, 296 U. S. 140 (1935) 15

McKesson & Robbins, Inc. v. United States, 27 C. C. P. A. 157 (C. A. D. 77) 9

Strakosh v. United States (No. 143) & Richards v. United States (No. 144), 1 Ct. of Cust. Appls. 360 .. 9

Tiffany v. United States, 105 F. 766 (C. C. S. D. N. Y., 1901) 9

United States v. H. V. Albrecht, et al., 27 C. C. P. A. 112 (C. A. D. 71) 9

United States v. Cody Manufacturing Co., Inc., et al., 44 C. C. P. A. (C. A. D. 639) 8

United States v. Danker & Marston, 2 Ct. of Cust. App. 462 ..... 9, 15

United States v. Good Neighbor Imports, Inc., 33 C. C. P. A. 91 (C. A. D. 321) 9

United States v. Fred Gretsch Mfg. Co., 28 C. C. P. A. 26 (C. A. D. 120) 9

United States v. Powell, 330 U. S. 238 (1947) 11

United States v. Ruzicka, et al., 329 U. S. 287 (1946) ... 11

United States v. Schering, et al., 123 F. 65, 66 (1943) .. 13

United States v. John A. Steer Co., 46 C. C. P. A. 132, 134 (1959) 13

Upshaw v. United States, 335 U. S. 410 (1948) 15

Wilkinson v. United States, 265 U. S. 401 (1961) 11

Statutes.

Tariff Act of 1930, Sec. 488, as amended, 19 U. S. C. 1488 ..... 3, 11

Tariff Act of 1930, Sec. 502, as amended, 19 U. S. C. 1502 ..... 3, 11, 15

Tariff Act of 1930, Sec. 505, as amended, 19 U. S. C. 1505 ..... 3, 11

Tariff Act of 1930, Sec. 514, as amended, 19 U. S. C. 1514 ..... 3, 9

Tariff Act of 1930, Sec. 515, as amended, 19 U. S. C. 1515 ..... 3, 9

Tariff Act of 1930, Sec. 516(b), as amended, 19 U. S. C. 1516(b) 2, 3, 6, 8, 9, 10, 11

Tariff Act of 1930, Paragraph 1402, as amended, 19 U. S. C. 1001 ..... 3, 6, 7, 8, 12

Tariff Act of 1930, Paragraph 1539(b) 19 U. S. C. Section 1001 ..... 3, 6, 7, 8, 12, 13, 14

Miscellaneous.

T. D. 54723, 93 Treas. Dec. 506 ..... 4, 12

T. D. 54921, 94 Treas. Dec. No. 35 ..... 5, 6, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. .....

NATIONAL STARCH PRODUCTS, INC.,
Petitioner,

vs.

THE UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Petitioner, National Starch Products, Inc., by its undersigned attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals, entered in the above cause on December 12, 1962, after rehearing, which judgment reversed a decision of the United States Customs Court entered on May 18, 1961.

OPINION BELOW.

The opinion of the United States Court of Customs and Patent Appeals (R. 15-29), printed in Appendix B hereto, *infra*, p. vii, is reported in 98 Treas. Dec. No. 4 at page

35 (C. A. D. 809). A prior decision of the United States Court of Customs and Patent Appeals (R. 3-10), which was withdrawn on rehearing, is unreported and is printed in Appendix B hereto, *infra*, p. xix. The opinion of the United States Customs Court (R. 1, pp. 77-91), printed in Appendix B hereto, *infra*, p. xxv, is reported in 46 Cust. Ct. 199.

JURISDICTION.

The judgment of the Court of Customs and Patent Appeals was entered on December 12, 1962, and its mandate which issued on January 19, 1963, is reprinted in Appendix B hereto, *infra*, page xviii. The time for filing a petition for writ of certiorari was extended by order of Mr. Chief Justice Warren dated March 14, 1963, to April 10, 1963, which order modified the previous order of the Chief Justice entered on February 26 extending the time for filing the petition to and including May 11. The jurisdiction of this Court is invoked under 28 U. S. C. 1256.

QUESTIONS PRESENTED.

1. Whether an American producer in a protest suit under Section 516(b) of the Tariff Act of 1930, 19 U. S. C. Sec. 1561(b), has the dual burden not only of proving that the collector's classification of the merchandise in question is erroneous but also of establishing the correct classification under that Act.

2. Whether an American producer, assuming that it does have a dual burden of proof in a protest suit under Section 516(b) of the Tariff Act of 1930, is entitled to rely on the presumption of correctness of an applicable general classification under which the merchandise in question is classified by the Customs Bureau if an *eo nomine* exception for the particular merchandise in question is shown to be erroneous.

STATUTES AND REGULATIONS INVOLVED.

The statutory provisions involved are Sections 488, 502, 505, 514, 515 and 516(b) of the Tariff Act of 1930, as amended, 19 U. S. C. §§ 1488, 1502, 1505, 1514, 1515 and 1516(b). These are printed in Appendix A hereto, *infra*, pp. i to vi.

In addition, the following classifications under the Tariff Act of 1930, 19 U. S. C. Section 1001, as amended and modified, are involved.

Paragraph 1402 as modified by the Annecy Protocol to the GATT, 84 Treas. Dec. 403, T. D. 52373, Supplemented by Presidential Proclamation, 85 Treas. Dec. 116, T. D. 52462:

> "Paper board, wallboard, and pulpboard, including cardboard (but not including leather board or compress leather, and except strawboard, solid fiber shoe board and all counter board, and pulpboard in rolls for use in the manufacture of wallboard), not plate finished, super-calendered or friction calendered, laminated by means of an adhesive substance, coated, surface-stained or dyed, lined or vat-lined, embossed, printed, decorated or ornamented in any manner, nor cut into shapes for boxes or other articles and not specially provided for:
>
> Wallboard and wet-machine board other than beer mat board . . . 5% ad val."

Paragraph 1539(b) as modified by the Sixth Protocol of Supplementary Concessions to the GATT, 91 Treas. Dec. 150, T. D. 54108:

> "Laminated products (whether or not provided for elsewhere in the Tariff Act of 1930 than in paragraph 1539(b) thereof) of which any synthetic resin or resin-like substance is the chief binding agent:

"Manufacturers wholly or in chief value of any product described in the preceding item 1539(b), or of any other product of which any synthetic resin or resin-like substance is the chief binding agent . . 21¢ per lb. and 17 percent ad val."

Other Treasury Decisions involved are, in pertinent part:

T. D. 54723, 93 Treas. Dec. 506, 508-509:

"TREASURY DEPARTMENT OFFICE OF THE COMMISSIONER OF CUSTOMS,

Washington, D. C., October 28, 1958.

"*To Collectors of Customs and Others Concerned:*

"The following abstracts of Bureau of Customs decisions of general interest are published for your information and guidance."

. . . . . .

"TARIFF CLASSIFICATION."

. . . . . .

"* * * (19) *Chipboard* composed of wood chips bound together by synthetic resin and consisting of surface layers made of thin wood chips and a middle layer, or core, made of coarse wood chips, considered to be vat-lined, classifiable as a manufacture wholly or in chief value of any product of which any synthetic resin is the chief binding agent under paragraph 1539(b), Tariff Act of 1930. Bureau letter dated October 28, 1958. (483.52.)"

. . . . . .

T. D. 54921, 94 Treas. Dec. No. 35, p. 5:

"TREASURY DEPARTMENT, OFFICE OF THE COMMISSIONER OF CUSTOMS,

Washington, D. C., August 20, 1959.

"*To Collectors of Customs and Others Concerned:*

"On January 16, 1959, pursuant to the provisions of section 516(b), Tariff Act of 1930, as amended, the National Starch Products, Inc., New York City, New York, an American producer of particle board, was informed that it is the practice to classify particle board of which a synthetic resin or resin-like substance is the chief binding agent as wallboard under paragraph 1402, Tariff Act of 1930, if imported in standard wallboard sizes and not processed or finished in any manner specified in that paragraph, or as a manufacture wholly or in chief value of any product of which a synthetic resin or resin-like substance is the chief binding agent under paragraph 1539(b) of the tariff act, if imported in other than standard wallboard sizes or processed or finished in any manner specified in paragraph 1402."

"After full consideration of the exception, the Bureau remains of the opinion that the practice set out above of classifying particle board having a synthetic resin or resin-like substance as the chief binding agent under paragraph 1402 or paragraph 1539(b) is correct."

STATEMENT.

This is an American producer's protest under Section 516(b) of the Tariff Act of 1930, as amended (Appendix A hereto, *infra*, p. iv), which was commenced in early 1959 (R. 1—pp. 5-11). The merchandise involved is a product known as "particle board" or "chipboard". This product may be generally described as sheets, of varying sizes and thicknesses, composed of wood particles (chips or flakes) bound together by synthetic resin. It is manufactured from wood particles, impregnated with urea formaldehyde, which, when compressed between two hot plates under pressure, are solidified into a solid sheet. Thereafter the material may be cut into different sizes and shapes and sanded (R. 1—pp. 17, 80; R. 5, 7, 18-19).

At all times pertinent to this case, the Customs Bureau classified particle board under paragraph 1539(b) of the Tariff Act of 1930 unless it was imported in "standard wallboard sizes", in which case it was classified as wallboard under paragraph 1402 of the Act.[1] This classification was based on an investigation made in 1948 which determined that wallboard was the chief use of particle board imported in standard wallboard sizes (R. 19; Appendix B hereto, *infra*, p. x).

Petitioner's evidence in the Customs Court established that the chief use of particle board (in what were presumably "standard wallboard sizes") was not as wallboard. In fact, Petitioner's evidence, according to the Customs Court, was

1. Paragraphs 1539(b) and 1402 of the Tariff Act of 1930 (19 U. S. C. § 1001) as modified and amended. Actually, under T. D. 54921 (p. 5, *supra*) only that material in "standard wallboard sizes" which was not processed or finished in any manner specified in paragraph 1402 was classified as "wallboard" under that paragraph. Particle board which was so processed and finished remained under paragraph 1539(b) with all other particle board.

> "abundant, clear, and convincing that, regardless of dimensions, particle board is not only not used as wallboard, but that it is not suitable for such use." (Appendix B hereto, *infra*, p. xxxvi.)

The Court thus found that the chief use classification under paragraph 1402 was in error.

The party in interest did not challenge the correctness of the collector's classification of particle board in general under paragraph 1539(b), and in fact neither offered evidence at the trial nor filed a brief. The party in interest simply stated at the trial that it would rely on the "presumption in favor of the governmental action." (R. 1—p. 76.)

No evidence having been offered by the party in interest to overcome the presumption of correctness of paragraph 1539(b) if the *eo nomine* classification under paragraph 1402 was proved erroneous, the Customs Court stated that "it has been established that a synthetic resin is the chief binding agent in the instant as well as in all particle board" and went on to hold that particle board in "standard wallboard" sizes should be classified with all other particle board under paragraph 1539(b) (R. 1—p. 89; Appendix B, *infra*, p. xxxvii).

The Court of Customs and Patent Appeals, in its first decision, expressly approved the findings of the Customs Court and found ample support in the record for concluding that the collector's classification of particle board in "standard wallboard sizes" under paragraph 1402, *supra*, was erroneous (Appendix B hereto, *infra*, pp. xxi-xxii).

On rehearing, the Court of Customs and Patent Appeals withdrew its original decision and reversed the decision of the Customs Court (Appendix B hereto, *infra*, pp. vii-xvii). The sole basis for this reversal was the court's conclusion that the petitioner had failed to prove by

affirmative evidence that the merchandise in question should have been classified under paragraph 1539(b). The court held that the petitioner had not offered evidence to prove that there was a pre-existing "product" of which synthetic resin was the chief binding agent and of which particle board was a "manufacture" (Appendix B hereto, *infra*, p. xvii). Since, according to the Court, Petitioner had the "dual burden" of proving that classification under paragraph 1402 was erroneous and that classification under paragraph 1539(b) was correct, if it failed to prove the latter, it made no difference whether it had proven that classification under paragraph 1402 was erroneous. This requirement of a "dual burden of proof" was said by the court below to have its origin in *Arthur* v. *Unkart*, 96 U. S. 118 (1877) (Appendix B. hereto, *infra*, p. xi, n. 4).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below imposes a requirement in protest suits brought by American producers under Section 516(b) of the Tariff Act of 1930 (Appendix A hereto, *infra*, p. iv) which is contrary to the express language and manifest purpose of that statute. The result is to seriously impair the effectiveness of Section 516(b) as a means whereby any American producer can directly challenge the classification of, or rate of duty assessed upon imported goods with which it must compete. The question posed by this case is thus one of broad scope and importance in the administration of the Tariff Act of 1930 and should be considered and resolved by this Court.

The decision of the court below relies on a group of cases involving *importers'* suits[3] for recovery of excessive

3. *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 C. C. P. A. 88 (C. A. D. 735); *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 C. C. P. A. 67 (C. A. D. 639);

duties brought under Sections 514 and 515 of the Tariff Act of 1930 (Appendix A hereto, *infra*, p. ii) and under the predecessors of those sections in earlier Tariff Acts. These cases are said to be authority for the general proposition that *every* protestant, whether he be an *importer* suing to recover excessive duties under Sections 514 and 515, *supra*, or an *American producer* protesting the classification of, or rate of duty assessed on competing imported goods under Section 516(b) of the Act (Appendix A hereto, *infra*, p. iv), must not only prove that the collector's classification of the merchandise in question is wrong but must also establish the correct classification of the merchandise in question. This "dual burden" of proof is said to have its origin in the decision of this Court in *Arthur* v. *Unkart*, 96 U. S. 118 (1877) which involved an *importer's* suit to recover excessive duties (Appendix B hereto, *infra*, p. xi, n. 4).

An *importer's* protest suit under Sections 514 and 515, *supra*, and an *American Producer's* protest under Section 516(b), *supra*, are authorized under separate statutes. The statutes contain different requirements and the basic objectives and effect of suits under the two statutes differ.

The "dual burden" of proof is an essential requirement only in an *importer's* suit *to recover excessive duties*, for the reasons stated by this Court in *Arthur* v. *Unkart*, *supra*:

Lowenthal Trimming Corp. v. *United States*, 39 C. C. P. A. 149 (C. A. D. 477); *W. T. Grant Company* v. *United States*, 38 C. C. P. A. 57 (C. A. D. 440); *United States* v. *Good Neighbor Imports, Inc.*, 33 C. C. P. A. 91 (C. A. D. 321); *United States* v. *Fred Gretsch Mfg. Co.*, 28 C. C. P. A. 26 (C. A. D. 120); *McKesson & Robbins, Inc.* v. *United States*, 27 C. C. P. A. 157 (C. A. D. 77); *United State* v. *H. V. Albrecht, et al.*; 27 C. C. P. A. 112 (C. A. D. 71); *United States* v. *Danker & Marston*, 2 Ct. of Cust. App. 462; *Strakosh* v. *United States* (No. 143) & *Richards* v. *United States* (No. 144), 1 Ct. of Cust. Appls. 360; *Tiffany* v. *United States*, 105 F. 766 (C. C. S. D. N. Y., 1901); *Davis et al.* v. *Miller et al.*, 91 F. 647 (C. C. A. 2nd Cir., 1898); and *Fisk* v. *Seeberger*, 38 F. 718 (D. C. N. D. Ill., 1889).

"The importers here bring their suit, alleging in their complaint not merely that there was an exaction of duties, but that such exaction was excessive and illegal. * * *" (96 U. S. 122).

* * * * * * *

"* * * it is to be observed that in the case of the articles in question, as with most other importations, they were admitted to be liable to some duty. *Simply holding the goods for duty was not, therefore, of itself an illegality. It was only when they were held for more duty than the law justified that it became duress and illegal; and, to entitle himself to recover for the illegality, the plaintiff must show such excessive charge.* If the collector had no authority in the premises, and could hold the goods for no amount whatever, a different question would arise. But here the *very issue* was as to amount, and the proof, therefore, of illegal amount rested upon the plaintiff" (96 U. S. 123). (Italics supplied.)

Thus, an *importer must* carry a "dual burden" of proof because mere proof that the collector's classification was wrong is not proof that the amount of duties assessed was excessive.

Section 516(b) of the Tariff Act of 1930 (Appendix A, hereto, *infra*, p. iv) permits an American producer to protest the "classification of, or rate of duty assessed upon," imported merchandise of a class or kind manufactured or sold at wholesale by him. But the *American producer's* protest has no effect on the amount of duties paid on the particular entry under protest. Under the statute (Section 516(b), *supra*), notwithstanding such protest, merchandise of the kind in question continues to be classified and liquidated in accordance with the existing decision of the Secretary. If the protest is "sustained in whole or in part" (Section 516(b), *supra*), *future* entries of such merchandise are classified in accordance with the court's decision.

Thus, the effect of an American producer's protest is entirely prospective, and the basic reason for the "dual burden" of proof is not applicable.

The statute itself does not impose such a "dual burden." The American producer may protest *either* the classification or rate of duty assessed. He may go further and suggest what the proper classification should be but nowhere does the statute require more than proof that the collector's classification of the merchandise in question was erroneous. If that burden is sustained, and no effort is made to establish the proper classification, or the Court makes no finding as to the proper classification, it is then the collector's duty and responsibility to reclassify such merchandise under applicable Treasury Decisions. (See Sections 488, 502, and 505 of the Tariff Act of 1930, Appendix A hereto, *infra*, pp. i-ii.)

In this decision establishing a "dual burden" in an American producer's protest suit, the Court of Customs and Patent Appeals has misconstrued Section 516(b) of the Tariff Act of 1930, and in so doing has misapplied the rule announced by this Court in *Arthur* v. *Unkart*, 96 U. S. 118 (1877).

This question has not been passed upon by this Court. Since it involves a basic principle of broad importance both in the administration and in the effectiveness of that Act, and a misapplication of a decision of this Court, under the principles announced in *United States* v. *Powell*, 330 U. S. 238 (1947) and *United States* v. *Ruzicka, et al.*, 329 U. S. 287 (1946), and *Wilkinson* v. *United States*, 265 U. S. 401 (1961), certiorari should be granted.

2. To deny petitioner the benefit of the presumption of correctness of a collector's classification is in direct conflict with the statute (Section 502, Appendix A hereto *infra*, p. i) and conflicts with this Court's decision in *Arthur* v. *Unkart*, 96 U. S. 118 (1887).

Assuming *arguendo*, that petitioner has a dual burden of proving both that the Collector's classification is erroneous and that its claimed classification is correct, this burden was clearly sustained.

Under T. D. 54723 and T. D. 54921 (*supra*, pp. 4-5) particle board of which any synthetic resin is the chief binding agent is classified under paragraph 1539(b) of the Tariff Act of 1930 except when it is imported in "standard wallboard sizes," (and meets certain other requirements) in which case it is classified under the *eo nomine* classification of paragraph 1402 as "wallboard." Petitioner contended only that the latter *exception* was incorrect, i. e. that even in wallboard sizes the chief use of particle board was not as wallboard and therefore it should not be classified under paragraph 1402. Both the Customs Court and the Court of Customs and Patent Appeals agreed that petitioner had proved its case in this regard.

Having proved that the exception to classification of particle board under paragraph 1539(b) was incorrect, the collector's classification of all particle board under 1539(b) is fully applicable to the instant merchandise. Petitioner, as a matter of law, was entitled to rely on the presumption of correctness of this classification pursuant to Section 502 of the Tariff Act of 1930 (Appendix A hereto, *infra*, p. i) and this Court's pronouncement in *Arthur* v. *Unkart*, 96 U. S. 118 (1877):

> "It is not doubted that it was the duty of the collector, in the first instance, to decide whether the articles imported were dutiable, and at what rate. The statute makes it his duty. * * *" (96 U. S. 121.)
>
> "* * * These officers are, however, selected by law for the express purpose of deciding these questions: they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that

> *their decisions should carry with them the presumption of correctness.* * * *" (96 U. S. 121-122.) (Italics supplied.)

Respondent relied on the same rule of law and elected to rely on the presumption of correctness of the existing classification (R. 1—p. 76). Under this presumption, it is assumed the collector has found as true all facts necessary to the classification it made. As the court below said on another occasion:

> "It is presumed the collector found every fact to exist to sustain his classification. *United States* v. *Marshall Field & Co.*, 17 Ct. Cust. Appls. 1, T. D. 43309." *United States* v. *John A. Steer Co.*, 46 C. C. P. A. 132, 134 (1959).

And the Second Circuit has stated the rule even more clearly:

> "Where the classification of merchandise depends upon the existence of specified descriptive characteristics, it is to be presumed in favor of a correct classification that those characteristics were found by the officers of the customs. These officers are selected by law for the express purpose of deciding these questions. They are empowered and required to pronounce a judgment in the case, and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. *United States* v. *Rosenwald*, 67 Fed. 323, 14 C. C. A. 399, 35 U. S. App. 98; *Arthur* v. *Unkart*, 96 U. S. 122, 24 L. Ed. 768." *United States* v. *Schering et al.*, 123 F. 65, 66 (2d Cir. 1943).

Respondent did not challenge the correctness of the collector's general classification of particle board under 1539(b), but conceded that the merchandise in question was particle board of the type which the collector so classified (R. 1—p. 76; Appendix B hereto, *infra*, pp. xxxi-xxxii). Respondent maintained only that the *exception* for *particle*

board in "standard wallboard sizes" applied to this merchandise. It was therefore unnecessary for petitioner to offer any evidence on facts presumed as a matter of law and conceded by Respondent. The Customs Court was indisputably correct in holding that the merchandise should be classified under paragraph 1539(b).

The obvious error in reversing the Customs Court is illustrated by the following passages from the decision of the court below:

> "The Customs Bureau classifies particle board under paragraph 1539(b) unless it is imported in 'standard wallboard sizes,' in which case it is classified as wallboard under paragraph 1402. This classification is based on an investigation made in 1948 which determined that wallboard was the chief use of particle board imported in standard wallboard sizes.
>
> "Our decision herein is controlled by the long established principle that the burden of proof is on a protestant to show not only that the collector's classification is wrong but also to establish the classification of the merchandise in issue which is asserted by the protestant to be the proper classification. * * *" (Appendix B hereto, *infra*, p. x.)
>
> * * * * *
>
> "* * * We need not, however, pass on appellee's contention that the uses made of the imported sheets take them out of the wallboard classification. *It is sufficient for the present case that appellee did not establish by evidence of record* that the imported 4′ × 8′ sheets of particle board are 'manufactures of' a 'product' which fall within the 3rd category specified in paragraph 1539(b)." Appendix B hereto, *infra*, p. xvii.) (Italics supplied.)

The issue of the propriety of the existing general classification of particle board under paragraph 1539(b) could not be raised for the first time in the Court of Customs and Patent Appeals in an *importer's* protest, *Davies* v.

Arthur, 96 U. S. 148 (1877); *United States* v. *Danker & Marston*, 2 Ct. of Cust. App. 462 (1912); and it necessarily follows that an *importer* can not do so in an *American producer's* protest. But even if the question were properly raised, it was improper for the court below to deny petitioner the benefit of the presumption of correctness of that classification; to ignore the party in interest's concession of facts necessary to classification of the merchandise under paragraph 1539(b); to search the record for evidence which petitioner was not required to introduce to prove the correctness of classification under paragraph 1539(b) and, in the absence of such "evidence of record," to reverse the Customs Court.

The error of the court below in this respect seems so apparent as to justify this Court in summarily reversing the decision without further argument or briefs. That decision is patently in conflict with the decision of this Court in *Arthur* v. *Unkart*, *supra*, and the statute (Sec. 502, Appendix A hereto, *infra*, p. i). Certiorari should be granted on the same principles as were applied in *Upshaw* v. *United States*, 335 U. S. 410 (1948) and *McCandless* v. *Furland*, 296 U. S. 140 (1935) as well as Rule 19-1(b) of the Rules of this Court.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. PRICE,
THADDEUS S. SNELL,
ROBERT W. WRIGHT, JR.,
of
SPRAY, PRICE, TOWNSEND & CUSHMAN,
134 South LaSalle Street,
Chicago 3, Illinois.

APPENDIX A.

Sections 488, 502, 505, 514, 515 and 516(b) of the Tariff Act of 1930, as amended [19 U. S. C. §§ 1488, 1502, 1505, 1514, 1515 and 1516(b)]

§ 488. Appraisement of merchandise

"The collector within whose district any merchandise is entered shall cause such merchandise to be appraised. June 17, 1930, c. 497, Title IV, § 488, 46 Stat. 725."

§ 502. Regulations for appraisement and classification—Powers of Secretary of the Treasury

(a) The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law, and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry, and may direct any appraiser, deputy appraiser, assistant appraiser, or examiner of merchandise to go from one port of entry to another for the purpose of appraising or assisting in appraising merchandise imported at such port.

REVERSAL OF SECRETARY'S RULINGS.

(b) No ruling or decision once made by the Secretary of the Treasury, giving construction to any law imposing customs duties, shall be reversed or modified adversely to the United States, by the same or a succeeding Secretary, except in concurrence with an opinion of the Attorney General recommending the same, or a final decision of the United States Customs Court.

DUTIES OF CUSTOMS OFFICERS.

(c) It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs. June 17, 1930, c. 497, Title IV, § 502, 46 Stat. 731.

§ 505. Payment of duties.

"The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation. June 17, 1930, c. 497, Title IV, § 505, 46 Stat. 732."

§ 514. Protest against collector's decisions

Except as provided in subdivision (b) of section 1516 of this title (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery,

under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. June 17, 1930, c. 497, Title IV, § 514, 46 Stat. 734.

§ 515. Same; review of decisions

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision.

If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law. June 17, 1930, c. 497, Title IV, § 515, 46 Stat. 734.

§ 516. Appeal or protest by American producer

* * * * * *

CLASSIFICATION.

(b) The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon, designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper

classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary the complainant may file with the Secretary, not later than thirty days after the date of such decision, notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to the proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port. The Secretary shall direct the collector at such port to notify such complainant immediately when the first of such entries is liquidated. Within thirty days after the date of mailing to the complainant of notice of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Notwithstanding such protest is filed, merchandise of the character covered by the published decision of the Secretary, when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court

of Customs and Patent Appeals, rendered under the provisions of subsection (c) of this section, not in harmony with the published decision of the Secretary, shall be classified and the entries liquidated in accordance with such decision of the Secretary, and, except as otherwise provided in this chapter, the liquidations of such entries shall be final and conclusive upon all parties. If the protest of the complainant is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of such court decision, shall be subject to classification and assessment of duty in accordance with the final judicial decision on the complainant's protest, and the liquidation of entries covering such merchandise so entered or withdrawn shall be suspended until final disposition is made of such protest, whereupon such entries shall be liquidated, or if necessary, reliquidated in accordance with such final decision. * * * June 17, 1930, c. 497, Title IV, § 516, 46 Stat. 735; June 25, 1938, 5 p. m., E. S. T., c. 679, § 17(a), 52 Stat. 1084; June 25, 1948, c. 646, § 39, 62 Stat. 992.

APPENDIX B.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

(Date of Decision Dec. 12, 1962.)

October Term, 1962.

The United States (Index Industrial Corp., Party in Interest), *Appellant.*
vs.
National Starch Products, Inc., *Appellee.*
} Customs Appeal No. 5088.

SMITH, *Judge.*

In a decision dated May 18, 1962, we affirmed the decision of the Customs Court which had sustained an American manufacturer's protest under section 516(b) of the Tariff Act of 1930, as modified by the Annecy Protocol to the GATT, T. D. 52373, supplemented by Presidential Proclamation, T. D. 52462. The imported merchandise is 4′ x 8′ sheets of "particle board."

Appellant filed a Petition for Rehearing which was granted and the matter has been reheard. On the rehearing it was appellant's position that:

> (a) Appellee, under its "dual burden," must show not only that the imported merchandise was wrongly classified but also must show where it should have been classified.
>
> (b) Appellee to prevail must therefore show the correct classification of the imported merchandise to be under para. 1539(b).

(c) To prevail, appellee must establish that the imported 4' x 8' sheets of particle board are "manufactures of" a "product of which any synthetic resin or resin-like substance is the chief binding agent."

(d) Under *U. S. v. J. E. Bernard & Co.*, 42 CCPA 69, C.A.D. 973, a "product" for purposes of paragraph 1539(b) must have independent existence as an article of commerce. The only "product" having a binding agent of a "synthetic resin or resin like substance" having independent commercial existence is the particle board itself.

(e) Under applicable decisions of the Supreme Court and this court, sanding and cutting unfinished particle board to the imported 4' x 8' sizes does not make a "manufacture of" the product under paragraph 1539(b) and the Customs Court and this court in its original decision were in error in sustaining the protest.

Upon reconsideration we are convinced that appellant is correct and that our original decision was in error. We hereby withdraw it, substituting therefore the following opinion.

The Index Industrial Corp., Party in Interest, hereafter referred to as appellant, imported the merchandise in issue which was classified[1] as "wallboard" under the provisions of paragraph 1402 of the Tariff Act of 1930, as modified by the Annecy Protocol to the GATT, T. D. 52373, supplemented by Presidential Proclamation, T. D. 52462. Duty was assessed thereon at 5 per cent ad valorem. Appellee, an American manufacturer, protested the entry pursuant to the provisions of section 516(b) of that Act as amended (75

1. Exhibit 1-J, a letter from the collector to appellee notifying the latter of the import, states in part:

> Please note Entry No. 782774 was made at this port on Sept. 18, 1959 and covered eight crates of virola chip board in sheets size 4' x 8'. This entry was liquidated on Dec. 16, 1959 under paragraph 1402 at 5% ad valorem as wall board.

U.S.C. 1516(b)), claiming the merchandise properly classifiable under paragraph 1539(b) of said Act, as modified by the Sixth Protocol of Supplementary Concessions to the GATT, T.D. 54108, as manufactures wholly or in chief value of any product of which a synthetic resin is the chief binding agent. The Customs Court sustained the protest, C. D. 2256. Appellant appeals from that judgment.

The respective provisions read:

Paragraph 1402 and T.D. 52373:

> Paper board, wallboard, and pulpboard, including cardboard (but not including leather board or compress leather, and except strawboard, solid fiber shoe board and all counter board, and pulpboard in rolls for use in the manufacture of wallboard), not plate finished, super-calendered or friction calendered, laminated by means of an adhesive substance, coated, surface stained or dyed, lined or vat-lined, embossed, printed, decorated or ornamented in any manner, nor cut into shapes for boxes or other articles and not specially provided for:
>
> > Wallboard and wet-machine board other than beer mat board . . . . . 5% ad val.

Paragraph 1539(b) and T.D. 54108:

> Laminated products (whether or not provided for elsewhere in the Tariff Act of 1930 than in paragraph 1539(b) thereof) of which any synthetic resin or resin-like substance is the chief binding agent:
>
> * * * * *
>
> Manufactures wholly or in chief value of any product described in the preceding item 1539(b), or of any other product of which any synthetic resin or resin-like substance is the chief binding agent . . 21¢ per lb. and 17 percent ad val.

While the record does not show the composition of the imported particle board, it does show that it corresponds to a domestic particle board which is made from chips, flakes

or splinters of wood which are impregnated with a synthetic resin, then pressed into sheets in a hot plate press.[2]

The Customs Bureau classifies particle board under paragraph 1539(b) unless it is imported in "standard wallboard

---

2. In the instant case neither party presented evidence describing the method of making the particular importation. However, the following testimony for appellee was given on direct examination by a Mr. Fischer, sales manager of the United States Plywood Corporation, the company which manufactures a particle board known as "Novoply:"

> Q. Will you look at the sample which I hand you, and state whether or not that is a sample of the particle board as you merchandise it? A. That is a sample of Novoply, and it comes under the generic term of particle board. (The sample was marked as plaintiff's Exhibit 6.)
>
> * * * * *
>
> Q. Will you examine Exhibit 2 and 3, (Exhibit 3 is a sample of virola board representative of the imported merchandise) and compare them with Exhibit 6? A. Yes. This Virola board is also a particle board, with fine particles apparently on the surface. It looks like they are a little more coarse in the center.
>
> Q. The same class or kind of merchandise as Exhibit 6, your merchandise is? A. Yes, they are both particle boards.
>
> * * * * *
>
> Q. Will you just briefly describe how those two component materials are united to form Exhibit? A. The method of manufacture?
>
> Q. Yes, just briefly. A. First of all, you have fir logs which are used in the manufacture of plywood. The residue left on the lath(e) is cut into slabs, and then flaked to make the top and bottom surface. Those flakes are spread in a pan. First resin is applied to them, and then they are spread into a pan, and it is an automated factory; the pan goes along and then the center; the particles are put into the pan. It goes to a third station, and flakes are put in to form the surface. Both the particles and the flakes have been impregnated with resin. These flakes and particles are put through a machine having rollers as its main part, and these bounce over the rollers and pick up the resin. Then after it is laid in these pans, it is a slab; the sides are taken away, and it is pressed in a hot plate press, and *it is cut and sanded.* (Emphasis added.)

sizes,"[3] in which case it is classified as wallboard under paragraph 1402. This classification is based on an investigation made in 1948 which determined that wallboard was the chief use of particle board imported in standard wallboard sizes.

Our decision herein is controlled by the long established principle that the burden of proof is on a protestant to show not only that the collector's classification is wrong but also to establish the classification of the merchandise in issue which is asserted by the protestant to be the proper classification.[4] As recently stated in *Atlantic Aluminum & Metal Distributors, Inc.* v. *U. S.*, 47 CCPA 88, C.A.D. 735:

3. The customs examiner who passed the instant importation testified that the standard sizes were "4 by 6; 4 by 8; 4 by 10 mainly. Walls are built with 16 inch center joists, and in order to be used as wallboard it has to be in multiples of 16 inches."

4. The many cases in this court in which the so-called "dual burden" of proof has been applied were based on principles long established by the Federal Courts in dealing with customs cases. This long established rule appears to have its origin in *Arthur* v. *Unkart*, 96 U.S. 118 (1877). There, in an action against the collector to recover the amount of duties alleged to have been exacted in violation of law, the lower court had charged the jury that the burden of proof was on the collector to show, by a fair preponderance of the evidence, that the goods had been properly classified. In a decision reversing the judgment below, Mr. Justice Hunt stated:

> The importers here bring their suit, alleging in their complaint not merely that there was an exaction of duties, but that such exaction was excessive and illegal. The burden of proof is upon the party holding the affirmative of the issue.
>
> * * * * *
>
> Again, it is to be observed that in the case of the articles in question, as with most other importations, they were admitted to be liable to some duty. Simply holding the goods for duty was not, therefore, of itself an illegality. *It was only when they were held for more duty than the law justified that it became duress and illegal; and, to entitle himself to recover for the illegality, the plaintiff must show such excessive charge. If the collector had no authority in the premises, and could hold the goods for no amount whatever, a different question would arise. But here the very issue was as to amount,*

> It is axiomatic that a presumption of correctness attaches to the collector's classification. *Lowenthal Trimming Corp.* v. *United States*, 39 CCPA 149, C.A.D. 477; *McKesson & Robbins, Inc.* v. *United States*, 27 CCPA 157, C.A.D. 77. To overcome this presumption, the protestant has the burden of proving not only that the collector erred, but also that the classification urged by the protestant is correct. *W. T. Grant Company* v. *United States*, 38 CCPA 57, C. A. D. 440; *United States* v. *Good Neighbor Imports, Inc.*, 33 CCPA 91, C. A. D. 321; *United States* v. *Fred Gretsch Mfg. Co., Inc.*, 28 CCPA 26, C.A.D. 120.

Unless there is substantial evidence in the record to establish the propriety of the protestant's asserted classification of the imported merchandise, the protest must be overruled and it is unnecessary to consider whether or not the collector's classification is wrong. *United States* v. *H. V. Albrecht, Etc.*, 27 CCPA 112, 117, C. A. D. 71; *W. T. Grant Co.* v. *United States*, 38 CCPA 57, 65, C. A. D. 440; *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, 74, C. A. D. 639; *Davies et al.* v. *Miller et al.*, 91 F. 647.

We shall, therefore, consider at the outset whether appellee sustained its burden of proof of establishing that the imported 4′ x 8′ sheets of particle board were properly classifiable under paragraph 1539(b). We shall start our consideration of this matter with an analysis from which it will be seen that paragraph 1539(b) establishes three categories of merchandise as follows:

> (1) Laminated products of which any synthetic resin or resin-like substance is the chief binding agent.

---

and the proof, therefore, of illegal amount rested upon the plaintiff. (Emphasis added.)

See also *Strakosh* v. *United States*, 1 CCPA 360, T.D. 31453, *U. S.* v. *Danker & Marston*, 2 CCPA 462, T.D. 32208, *Tiffany* v. *United States*, 105 F. 766, and the charge to the jury in *Fisk et al.* v. *Seeberger*, 38 F. 718.

(2) Manufactures wholly or in chief value of any of the foregoing laminated products.

(3) Manufactures wholly or in chief value of any other product of which any synthetic resin or resin-like substance is the chief binding agent.

The only contention which has been advanced here by appellee is that the imported 4' x 8' sheets of particle board fall within the third category, stating in its protest that:

> * * * We claim the imported merchandise to be properly classifiable under paragraph 1539(b). * * * The reason for our claim is that the merchandise is a *manufacture wholly or in chief value of any product* of which synthetic resin is the chief binding agent * * *. (Emphasis added.)

Appellant's contention that appellee has failed to show the merchandise properly classifiable under paragraph 1539(b), is predicated on the theory that the importation is not a *manufacture of a product* having the requisite chief binding agent. Appellant concedes that the importation is a "product" having the required binding agent.

The decision of this court mainly relied upon by counsel involving that issue is *United States* v. *J. E. Bernard & Co., Inc.*, 42 CCPA 69, C. A. D. 573. There it was held that washing machine agitators made of Bakelite were properly classified under paragraph 1539(b). The court found that Bakelite, "consisting basically of synthetic phenolic resin and finely ground cotton linters," had an independent commercial existence as a molding compound which was purchased by molding companies and formed into various articles.

It appears from the testimony herein that the domestic particle board "Novoply" is subjected, after it leaves the press, to sanding and cutting operations. No evidence was presented to show that the imported "Virola" board

was made by a different process. There appears to be no question but that "Novoply" and the imported "virola" particle board are of the same class or kind of merchandise and are adapted to the same uses. It therefore would seem to be a reasonable and non-rebutted inference of fact that the two articles are made by substantially the same process. Thus, it would appear that after the unfinished "Virola" particle board leaves the hot press, it too would be sanded and cut into the imported 4' x 8' sheets. Under the *J. E. Bernard* case, relied on by appellant, the "*product*" of which synthetic resin is the chief binding agent of paragraph 1539(b) must have an independent commercial existence before it constitutes a "*product*" in the sense of Section 1539(b) from which "manufactures wholly or in chief value" of such "*product*" can be made. See also *Cohn & Lewis* v. *United States*, 25 CCPA 220, T. D. 49335 and *United States* v. *Accurate Millinery Co. et al.*, 42 CCPA 229, C. A. D. 599. If, therefore, the "*product*" were the cut and sanded 4' x 8' sheets of particle board *as imported*, then the imported merchandise cannot logically also be a "manufacture" of that "product", since the "manufacture" and the "product" are identical. A contrary interpretation would render meaningless the words "product" and "manufactures" in paragraph 1539 (b).

If, however, we assume, *arguendo*, that the "product" is the unfinished particle board before it is cut and sanded,[5] the issue thus presented is whether, under the applicable authorities, the cutting and sanding operations transform the unfinished particle board "product" into a "manufacture of" particle board so as to be properly classified within the third category of paragraph 1539(b).

5. We make this assumption *arguendo* because we doubt that uncut and unsanded particle board can be said to have independent commercial existence. There is no evidence in the record on this question.

Appellant's Brief in Support of Petition for Rehearing, in analyzing what is termed "The 'Manufacture of' Problem" contains the following analysis and conclusions which we here adopt.

> (a) It is clear from a long line of decisions of this Court and the Supreme Court that in order for an article to be a "manufacture of" a preceding thing, there must be a transformation of the thing into a new article of commerce.
>
> (b) It is clear from the facts of this case that the particle board involved is merely cut and sanded after becoming a "product . . . of which synthetic resin is the chief binding agent," and it is also clear that such cutting and sanding does not transform the particle board into a new article of commerce.
>
> (c) Therefore, since the cutting and sanding operation applied to the "product of which the chief binding agent is synthetic resin" does not transform it into a new article of commerce, the imported article is not a "manufacture of" such product and, therefore, is not properly classifiable under paragraph 1539(b).

We think the foregoing conclusions are required by the pertinent rulings of the U. S. Supreme Court in *Hartranft* v. *Wiegmann*, 121 U. S. 609 and *United States* v. *Dudley*, 174 U. S. 670.

In the *Hartranft* case, the collector had classified certain processed sea shells as "Shells, manufactures of;" and the importer brought an action to recover duties paid thereunder. The lower court found that the processed shells were not "manufactures of shells" and the Supreme Court affirmed with the following comment:

> * * * The question is, whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer, is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being

> afterwards etched by acids, so as to produce inscriptions upon them. It appears that the shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of pen-knives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufactures of shells, within the meaning of the statute.
>
> * * * * * *
>
> We are of opinion that the shells in question here were not manufactures, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, * * *. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article within the meaning of that term as used in the tariff laws. (121 U. S. 613-615.)

In the *Dudley* case, the collector had imposed a 25% duty on certain lumber boards which had been planed, tongued and grooved on the theory that they were "manufactures of wood" rather than "sawed boards, plank, deals and other lumber, rough or dressed." The importer's protest was sustained by the lower court and the Supreme Court affirmed stating:

> * * * while lumber planed upon one or both sides may be "dressed lumber," we think that when tongued and grooved it is still "dressed lumber," and not a new and distinct manufacture. In other words, that tonguing and grooving is an additional dressing, but it does not make it a different article. Lumber treated in this way is still known in the trade as lumber; advertised as lumber; handled as lumber; shipped as lumber; bought and sold by the thousand feet like lumber. (174 U. S. at 673-674.)

These cases as well as numerous others require that to be a "manufacture of," there must be a transformation of the starting material into a new article of commerce. "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'." *Anheuser-Busch Brewing Ass'n v. United States*, 207 U. S. 556, 562.

Upon reconsideration we hold that the imported 4′ x 8′ panels of finished particle board on which the protest was filed cannot logically be both a "*manufactures*" *of and* the "product" from which the "manufactures" are made as contemplated by paragraph 1539(b). Under the applicable authorities we find that sanding and cutting *unfinished* particle board, after it comes from the hot press, do not transform it into "manufactures" of that "product" as contemplated by paragraph 1539(b).

Appellee has not attempted to establish that the imported 4′ x 8′ sheets of particle board are "manufactures of" particle board but has been content instead with proofs directed to the alleged error of the collector in classifying the imported sheets as wallboard. The record is clear that if the sheets as imported are of a 4′ x 8′ size they are classified as wallboard by reason of their chief use. We need not, however, pass on appellee's contention that the uses made of the imported sheets take them out of the wallboard classification. It is sufficient for the present case that appellee did not establish by evidence of record that the imported 4′ x 8′ sheets of particle board are "manufactures of" a "product" which fall within the 3rd category specified in paragraph 1539(b).

For the foregoing reason, the judgment of the Customs Court is *reversed*.

REVERSED.

WORLEY, *C. J.*, sat but did not participate in decision.

MANDATE (Issued January 19, 1963):

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

(Order entered December 12, 1962.)

The United States (Index Industrial Corp., Party in Interest), *Appellant*, *vs.* National Starch Products, Inc., *Appellee*.	Customs Appeals No. 5088.

Said appeal having heretofore been brought on to be reheard before the court, pursuant to the granting of appellant's petition for rehearing herein, said cause has been reconsidered and a new opinion written and the original opinion handed down May 18, 1962, is hereby withdrawn and the new opinion substituted. Therefore, it is

ORDERED that the judgment of the Customs Court be, and the same is hereby, reversed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Friday, October 19, 1962.

The United States (Index Industrial Corp., Party in Interest), *Appellant*, *vs.* National Starch Products, Inc., *Appellee*.	Customs Appeal No. 5088.

Petition for rehearing having been filed on behalf of Index Industrial Corp., Party in Interest, and due consideration thereon having been had, it is

ORDERED that said petition be, and the same is hereby, granted, and said cause is hereby set for rehearing on Thursday, November 8, 1962.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

(Date of Decision—May 18, 1962.)

October Term, 1961.

The United States (Index Industrial Corp., Party in Interest), *Appellant*, *vs.* National Starch Products, Inc., *Appellee*.	Customs Appeal No. 5088.

WORLEY, *Chief Judge*.

The Index Industrial Corp., Party in Interest, hereafter referred to as appellant, imported certain merchandise[1] known as "particle board." The merchandise was classified as "wallboard" under the provisions of Paragraph 1402 of the Tariff Act of 1930, as modified by the Annecy Protocol to the GATT, T. D. 52373, supplemented by Presidential Proclamation, T. D. 52462. Duty was assessed thereon at 5 percent ad valorem. Appellee, an American manufacturer, protested pursuant to the provisions of Section 516(b) of that act, as amended, claiming the merchandise properly classifiable under Paragraph 1539(b) of said act, as modified by the Sixth Protocol of Supplementary Concessions to the GATT, T. D. 54108, as manufactures wholly or in chief value of any product of which a synthetic resin is the chief binding agent. The Customs Court sustained the protest, C. D. 2256. Appellant appeals from that judgment.

1. Exhibit 1-F, a letter from the collector to appellee notifying the latter of the import, states in part:

> Please Note Entry No. 782774 was made at this port on Sept. 18, 1959 and covered eight crates of virola chip board in sheets size 4' by 8'. This entry was liquidated on Dec. 16, 1959 under paragraph 1402 at 5% ad valorem as wall board.

The respective provisions read:

Paragraph 1402 and T. D. 52373:

> Paper board, wallboard, and pulpboard, including cardboard (but not including leather board or compress leather, and except solid fiber shoe board and all counter board, and pulpboard in rolls for use in the manufacture of wallboard), not plate finished, super-calendered or friction calendered, laminated by means of an adhesive substance, coated, surface stained or dyed, lined or vat-lined, embossed, printed, decorated or ornamented in any manner, nor cut into shapes for boxes or other articles and not specially provided for:
>
> Wallboard and wet-machine board other than beer mat board—5% ad val.

Paragraph 1539(b) and T. D. 54108:

> Laminated products (whether or not provided for elsewhere in the Tariff Act of 1930 than in paragraph 1539(b) thereof) of which any synthetic resin or resin-line substance is the chief binding agent:
>
> * * * * *
>
> Manufactures wholly or in chief value of any product described in the preceding item 1539(b), or of any other products of which any synthetic resin or resin-like substance is the chief binding agent—21¢ per lb. and 17 percent ad val.

The record shows that particle board is made from chips, flakes or splinters of wood which are impregnated with resin, then pressed into sheets in a hot plate press.

It appears that the Customs Bureau classifies particle board under Paragraph 1539(b) unless it is imported in "standard wallboard sizes,"[2] in which case it is classified as wallboard under Paragraph 1402. The classification

2. The customs examiner who passed the instant importation testified that the standard sizes were "4 by 6; 4 by 8; 4 by 10 mainly. Walls are built with 16 inch center joists, and in order to be used as wallboard it has to be in multiples of 16 inches."

resulted from an investigation made in 1948 regarding the chief use of particle board.

Appellant's position here is summarized in its brief[3] as follows:

> In this case, as in all customs litigation, the plaintiff has two burdens and, in order to prevail, he must meet and establish each of them. He must establish that:
>
> 1. The collector has erroneously classified the merchandise under protest, and that
>
> 2. The imported product ought properly to be classified within the tariff provision alleged by the plaintiff to include it.
>
> * * * * * *
>
> Appellant's position is that plaintiff has failed in this case to meet either of the necessary burdens and that plaintiff's claim should therefore be denied.

Appellee, plaintiff below, called eleven witnesses and introduced twelve exhibits. Appellant did not present any evidence or file a brief below, but relied solely on the presumption of correctness of the collector's classification.

In urging that appellee had failed to prove the collector's classification erroneous, appellant alleges that the evidence is "not sufficient to establish the chief use of particle board in 4' by 8' sizes."

That the Customs Court gave thorough consideration to the evidence and arguments below is evident from the following excerpts:

> * * * The evidence is abundant, clear, and convincing that, regardless of dimensions, particle board is not only not used as wallboard, but that it is not suitable for such use. Ten witnesses having direct contact with the sale of particle board, and personal knowledge of its ultimate uses, whose combined experiences em-

3. An Amicus Curiae brief on behalf of Columbia Forest Products Co., Ltd. has also been filed in support of appellant.

> brace every area of the country, positively asserted that particle board had no market in the wallboard trade, and conversely that wallboards were not suited to the ultimate purposes served by particle board. * * *
>
> * * * * *
>
> Moreover, we deem it especially significant that the evidence establishes that particle board is not practically nor commercially suitable for wallboard purposes. If it is not economically feasible to substitute particle board for wallboard, and the former does not possess desirable properties for use as wallboard, it is fairly and reasonably inferable that it is not so used to any substantial extent. Chief use in this area of application would seem, therefore, to have been clearly negated.
>
> * * * * * *
>
> * * * Since it has been established that a snythetic resin is the chief binding agent in the instant as well as in all particle board, the claim of the plaintiff for classification of such merchandise within the provisions of paragraph 1539(b) as modified, *supra*, with the consequent assessment of duty at the rate of 21 cents per pound and 17 per centum ad valorem, is sustained.

We are unable to agree with appellant's position. On the contrary, we think the conclusion of the Customs Court is supported by the evidence. *United States* v. *Riche*, 1 Ct. Cust. Appls. 19, T. D. 30776.

Appellant's contention that appellee has failed to show the merchandise properly classifiable under Paragraph 1539(b), is predicated on the theory that the importation is not a *manufacture of a product* having the requisite chief binding agent. Appellant concedes that the importation is a "product" having the required binding agent, but argues that it is not *a manufacture* of that product.

The only decision of this court cited by counsel involving that issue is *United States* v. *J. E. Bernard & Co., Inc.*, 42 CCPA 69, C. A. D. 573. There it was held that wash-

ing machine agitators made of Bakelite were properly classified under Paragraph 1539(b). The court found that Bakelite, "consisting basically of synthetic phenolic resin and finely ground cotton linters," had an independent existence as a molding compound which was purchased by molding companies and formed into various articles.

In the instant case neither party presented evidence describing the method of making the particular importation. However, the following testimony was given on direct examination by a Mr. Fisher, sales manager of the United States Plywood Corporation, the company which manufactures particle board known as "Novoply":

> Q. Will you look at the sample which I hand you, and state whether or not that is a sample of the particle board as you merchandise it? A. That is a sample of Novoply, and it comes under the generic term of particle board.
>
> • • •
>
> Q. Will you examine Exhibits 2 and 3,[4] and compare them with Exhibit 6? A. Yes. This Virola board is also a particle board, with fine particles apparently on the surface. It looks like they are a little more course in the center.
>
> Q. The same class or kind of merchandise as Exhibit 6, your merchandise is? A. Yes, they are both particle boards.
>
> Q. Adapted to the same use? A. Yes, sir.
>
> • • •
>
> Q. Will you just briefly describe how those two component materials are united to form Exhibit 6? A. The method of manufacture?
>
> Q. Yes, just briefly. A. First of all, you have fir logs which are used in the manufacture of plywood. The residue left on the lath is cut into slabs, and then flaked to make the top and bottom surface. Those

4. Exhibit 3 is a sample of virola board representative of the imported merchandise.

> flakes are spread in a pan. First resin is applied to them, and then they are spread into a pan, and it is an automated factory; the pan goes along and then the center; the particles are put into the pan. It goes to a third station, and flakes are put in to form the surface. Both the particles and the flakes have been impregnated with resin. These flakes and particles are put through a machine having rollers as its main part, and these bounce over the rollers and pick up the resin. Then after it is laid in these pans, it is a slab; the sides are taken away, and it is pressed in a hot plate press, and *it is cut and sanded.* (Emphasis supplied.)

It therefore appears that the particle board "Novoply" is subjected, after it leaves the press, to sanding and cutting operations. In our opinion the sanding and cutting operations are manufacturing operations performed on the product obtained from the hot press. No evidence was presented to show that the importation was made by a different process while the evidence does establish that "Novoply" and the imported particle board are of the same class or kind of merchandise, adapted to the same use. It is therefore a reasonable and non-rebutted inference of fact that the importation is made by substantially the same process. Appellant chose to offer no evidence on that point.

The judgment is affirmed.

AFFIRMED.

MARTIN, *J.*, sat but did not participate because of illness.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Friday, May 18, 1962.

• • • • •

The United States (Index Industrial Corp., Party in Interest), *Appellant*, *vs.* National Starch Products, Inc., *Appellee*.	Customs Appeal No. 5088.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

ORDERED that the judgment of the United States Customs Court be, and the same is hereby affirmed.

Decision of the Custom Court.

(C. D. 2256)

NATIONAL STARCH PRODUCTS, INC. v. UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST)

United States Customs Court, Second Division

Protest 60/2-422 against the decision of the collector of customs at the port of New York

(Decided May 18, 1961)

RAO, Judge: This is an American manufacturer's protest filed pursuant to the provisions of section 516(b) of the Tariff Act of 1930, as amended. It challenges the col-

lector's classification of certain imported particle board, in sheets 4 feet by 8 feet, as wallboard within the provisions of paragraph 1402 of said act, as modified by the Annecy Protocol to the General Agreement on Tariffs and Trade, 84 Treas. Dec. 403, T. D. 52373, supplemented by Presidential proclamation, 85 Treas. Dec. 916, T. D. 52462, with the consequent assessment of duty at the rate of 5 per centum ad valorem.

Plaintiff claims that said merchandise is not wallboard and, hence, is properly provided for in paragraph 1539(b) of said act, as modified by the Sixth Protocol of Supplementary Concessions to said General Agreement on Tariffs and Trade, 91 Treas. Dec. 150, T. D. 54108, as manufactures wholly or in chief value of a product of which a synthetic resin is the chief binding agent, at the rate of 21 cents per pound and 17 per centum ad valorem.

The respective trade agreement provisions read as follows:

Paragraph 1402 and T. D. 52373, *supra*:

> Paper board, wallboard, and pulpboard, including cardboard (but not including leather board or compress leather, and except strawboard, solid fiber shoe board and all counter board, and pulpboard in rolls for use in the manufacture of wallboard), not plate finished, supercalendered or friction calendered, laminated by means of an adhesive substance, coated, surface stained or dyed, lined or vat-lined, embossed, printed, decorated or ornamented in any manner, nor cut into shapes for boxes or other articles and not specially provided for:
>
> Wallboard and wet machine board other than beer mat board.....5% ad val.

Paragraph 1539(b) and T. D. 54108, *supra*:

> Laminated products (whether or not provided for elsewhere in the Tariff Act of 1930 than in paragraph 1539(b) thereof) of which any synthetic resin or resin-like substance is the chief binding agent:
>
> * * * * * *
>
> Manufactures wholly or in chief value of any product described in the preceding item 1539(b), or of any other product of which any synthetic or resin-like substance is the chief binding agent..... 21c per lb. and 17 percent ad val.

It is not disputed that the procedural steps for perfecting an American manufacturer's protest have been complied with, and the respective qualifying papers have been introduced into evidence as plaintiff's exhibits 1-A through 1-K, inclusive. Plaintiff cites the following excerpt from plaintiff's exhibit 1-E, a letter from the Acting Commissioner of Customs to counsel for the plaintiff, as properly posing the issue to which its protest is addressed:

> On January 16, 1959, your client was informed by the Bureau that it is the practice of the Customs Service to classify particle board of which a synthetic resin or resin-like substance is the chief binding agent as wallboard under paragraph 1402, Tariff Act of 1930, if imported in standard wallboard sizes and not processed or finished in any manner specified in that paragraph, or as manufactures wholly or in chief value of any product of which synthetic resin or resin-like substance is the chief binding agent under paragraph 1539(b) of the Tariff Act, if imported in other than wallboard sizes or processed or finished in any manner specified in paragraph 1402.

The record establishes that particle board is a wood product made from chips or flakes of wood, bonded with a synthetic resin, usually formaldehyde, and pressed into sheets in a hot plate press. It was first produced commercially in the United States in about the year 1946. Since that time, several domestic companies have undertaken to manufacture particle board, and it has also been imported. In either case, the resultant product is sufficiently similar to be identified as merchandise of the same class or kind, and directly competitive. Samples of the instant importation and of several of the domestic particle boards are in evidence as plaintiff's exhibits 2, 3, 4, 5, 6, 9, 10, 11, and 12.

It appears from the testimony of the customs examiner who passed the instant importation that his advisory classification thereof as wallboard resulted from an investigation he conducted in 1948 or 1950, in which he sought from the importer information as to the use of particle board. His inquiry led him to the conclusion that sheets of particle board in the standard width of 4 feet, in 6- to 12-feet lengths, or 8 feet by 8 feet, or ceiling tiles, 12 inches by 12 inches, were chiefly used as wallboard.

Ten witnesses called by the plaintiff testified to the contrary. They were Alfred Battaglia, a chemist, who, as product manager of the structural products division of the National Starch & Chemical Co., had direct sales responsibility for the distribution of his company's particle board, in all states east of the Mississippi River, and north of North Carolina, including contact with retailers and their customers;

George I. Fischer, product manager and national sales manager of the particle board, known as Novoply, produced by the United States Plywood Corp. This company markets Novoply on a nationwide basis. It is the duty of its product manager to ascertain where and how Novoply

is used, and to disseminate the information he acquires throughout the 120 branch offices of the company;

Richmond Gray, vice president in charge of sales for the Gray Products Co., Inc., whose particle board, bearing the brand name Graco Flakecore, is sold throughout the eastern half of the United States, in all states, other than Louisiana and Mississippi;

David Greeley, manager of field operations for the Silvatek Division of the Weyerhaeuser Co., having sales representation in every state of the United States, for the marketing of its particle boards, known as Versabord and Versaflake;

Jack W. Holdsworth, sales manager for the West Virginia Pulp & Paper Co., which sells its particle board, Westvaco Flake Board, throughout the East, as far south as Virginia, and in portions of the Middle West. The selling experience of this witness included sales of insulation board for the Armstrong Cork Co., and of hardboard for the Masonite Co.;

Henry S. Richards, Baltimore, Md., branch manager for United States Plywood Corp., who sells Novoply in Maryland and in parts of Virginia, West Virginia, and Pennsylvania;

Philip Tulchin, vice president of the Tulnoy Lumber Co., a retail and jobbing lumber company of Brooklyn, N. Y., which sells Versabord, and a good many wallboards, servicing an area of approximately 100 miles in diameter;

Charles C. Travis, a partner of Travis-Applegate Co., of Grand Rapids, Mich., a mill representative for the sale of lumber, plywood, veneers, plastics, and Graco products in the State of Michigan;

James W. Laylor, president of the Feely-Laylor Lumber Co. of Seattle, Wash., engaged in the wholesale dis-

tribution of lumber and other building materials, including Versabord, in the western part of Washington;

Frank P. Whittle, in charge of the plywood sales department for Daniel Buck, Inc., a wholesale distributor of lumber and plywood in Philadelphia, Pa., which handles Westvaco products.

In substance, these witnesses testified that particle board is primarily a core or filler material which is covered either with a wood veneer or a decorative plastic, such as Formica, in the manufacture of dinette furniture, particularly tabletops, kitchen counters, cabinets, store fixtures, furniture case goods, musical instrument cases, electrical mounting boards, baffle boards, and games. For such purposes, standard sizes of sheets of particle board may vary greatly from widths of 30 to 36 inches and lengths up to 120 inches. It is also used as a floor underlayment for resilient flooring, such as linoleum, in kitchens and playrooms, and for doors. With respect to the last-mentioned two uses of particle board, 4 by 8 sheets are particularly suitable, as they are common sizes in the construction industry.

Generally defining wallboard as a surfacing material or paneling applied to a wall or ceiling or used to form a wall, the witnesses for the plaintiff all agreed that, regardless of the size of the sheet, particle board was not only not used as wallboard, but was not suitable for such use. Perhaps the principal reason for this, to which all of the witnesses subscribed, was that there was too great a price differential between particle board and standard wallboards, such as Celotex, Upson Board, Gypsum Board, Homosote, and other plaster and fiberboards used as wallboards. Comparison costs given established that the maximum price of wallboard would not exceed 8 cents a square foot, although generally such boards are available for as little as 4 cents a square foot. Particle board, on the other hand, ranges

from a minimum of 11 cents per foot to as much as 17 or 18 cents per foot.

The evidence further established that particle board is not suitable for wallboard because it does not take a good paint surface; it lacks dimensional stability, in that it tends to change dimensionally under changes in moisture conditions; it has no fireproofing properties; it can not be taped so as to conceal the joints; and in its customary thickness of five-eighths or three-fourths of 1 inch, it is too thick to match traditional moldings and too heavy to rest against studs or joists which form the framework of walls.

By contrast, standard wallboards are too soft and spongy to be adapted for use as floor underlayment, and too lacking in strength and screw-holding power to be suitable for use in the manufacture of furniture.

There are suggestions in the record, only casually explored in cross-examination of certain of the witnesses, that some particle boards are sold and used as decorative wall panels. To the extent that they are, which is in no wise clearly indicated, it appears that these are thinner boards than those represented by the exhibits before the court.

In any event, it has been affirmatively established that of the millions of feet of particle board marketed nationally by the combined operations of the several companies with which the witness at bar were affiliated not more than a minor fraction thereof, if indeed any at all, was ultimately applied to wallboard uses.

Plaintiff's evidence has not been controverted. Counsel for the party in interest advised the court, at the conclusion of plaintiff's case, that he elected to stand upon the presumption of correctness attaching to the collector's

classification of the merchandise at bar, for the reason that—

> • • • We think there has been no evidence of the end uses of the imported particle board. We think there has been no evidence as to the chief uses of the imported particle board. There has been no evidence at all as to the uses of particle board, of the imported particle board, at the time this new and different article was introduced into the commerce of the United States, and I think on this basis, we are going to rely on our briefs, and not put on any witnesses at all.

The court has not been provided with further expression of the views of the party in interest, which, though afforded ample opportunity to do so, has omitted to file a brief in this case.

It is apparent from the record and from the proceedings preliminary to the institution of this action, that the collector's classification of the merchandise at bar as wallboard, within the provisions of paragraph 1402, as modified, *supra*, resulted from his conclusion that it consists of a class of material which is chiefly used in the forming of walls. To the extent that he has interpreted the *eo nomine* provision for wallboard as one contemplating use, his conclusion accords with the court's understanding of the definition of that term.

Wallboard is defined in Webster's New International Dictionary of the English Language, 2d edition, 1951, as follows:

> Any boarding designed to serve as, or to be used against, a wall; as a *wallboard* in a schoolroom. Specif., an artificial board of wood fiber, cane fiber, or the like, made in large sheets and used for the interior sheathing of the walls of rooms.

That this is the sense in which Congress employed that term in the Tariff Act of 1930 seems to flow from the fol-

lowing excerpt from the Hearings before a Subcommittee of the Committee on Finance, United States Senate, Seventy-First Congress, First Session, on H. R. 2667, the bill which became the 1930 act:

Statement of Dutro C. Cale representing Certain-Teed Products Corporation, New York City

* * *

SENATOR THOMAS. What use is made of this wall board.

MR. CALE. It is used for walls in the homes of people of moderate circumstances, not men with extravagant homes, but in small towns and country districts skilled labor is not easily available.

SENATOR THOMAS. It takes the place of plaster.

MR. CALE. Yes.

SENATOR THOMAS. Nailed on to the studding?

MR. CALE. Yes.

SENATOR THOMAS. And the joints are covered with a little wooden board giving a natural effect.

MR. CALE. Yes, they are covered.

SENATOR THOMAS. And when used that way and painted they give a very good appearance and it is very warm and it is serviceable?

MR. CALE. Yes, that is a fact and it is economical.

SENATOR THOMAS. And it is used by the same people of the country, the folks who are not able to build expensive buildings.

MR. CALE. Yes, probably in that type of building.

By its very intendment, wallboard is a designation which can only be interpreted in terms of use if its meaning is to be properly expressed. It relates to a class of articles having those properties which devote them to the particular use of forming the interior walls of rooms and buildings.

Under well-settled principals of law, where use is the criterion for determining the scope of a provision and its

application to a given importation, that which must be considered its chief use. *United States* v. *James P. Heffernan Paper Co.*, 17 C. C. P. A (Customs) 61, T. D. 43358; *United States* v. *C. J. Tower & Sons*, 26 C. C. P. A. (Customs) 1, T. D. 49534. The proposition to be resolved is whether the importation in issue belongs to that class or kind of merchandise which is chiefly used for the designated purpose. *Pacific Guano & Fertilizer Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 218, T. D. 42240.

Chief use is a question of fact which must be established on the basis of representative applications over an adequate geographical cross-section of the country. *L. Tobert Co., Inc., and American Shipping Co.* v. *United States*, 28 Cust. Ct. 456, Abstract 56581, affirmed 41 C. C. P. A. (Customs) 161, C. A. D. 544. It does not depend upon the use of the particular importation, but rather on the use of the class of merchandise to which the importation belongs. *Pacific Guano & Fertilizer Co. et al.* v. *United States*, supra; *H. J. Baker & Bro.* v. *United States*, 37 C. C. P. A. (Customs) 52, C. A. D. 419.

Consequently, it is immaterial to this discussion that the instant record is barren of evidence of the ultimate uses of the merchandise at bar.

In the recent case of *United States* v. *The Baltimore & Ohio R. R. a/c United China & Glass Company*, 47 C. C. P. A. (Customs) 1, C. A. D. 719, our appellate court adverted to some of the principles bearing upon the doctrine of chief use. It was there stated:

> However, it is not the use of a particular shipment but rather that of the particular class or type of goods involved which determines its chief use. *United States* v. *Spreckels Creameries, Inc.*, 17 CCPA 400, T. D. 43835.
>
> Moreover, while the meaning of an eo nomine designation must be determined as of the enactment of the

provision, *United States v. C. J. Tower & Sons*, 26 CCPA 1, T. D. 49534, where there is a classification expressly dependent on the chief use of the class of merchandise involved, the determination of such use of the imported class of merchandise should be made as of the date of importation thereof. *H. J. Baker & Bro. v. United States*, 37 CCPA 52, C. A. D. 419, and cases there cited. With reference to this proposition, this court stated in *Wilbur-Ellis Co. et al. v. United States*, 18 CCPA 472, T. D. 44762, at page 479:

> * * * if there be an *eo nomine* designation, the common meaning thereof must be determined as of the date of the enactment of the tariff act, but if it is further provided that the thing designated shall be classified under a given provision only if chiefly used for a specified purpose, the question of use should be determined, *not as of the effective date of the tariff act but as of the date of the importation of the particular merchandise involved or immediately prior thereto.* [Emphasis ours.]

We believe that where, as here, classification is to be determined on the basis of chief use, that determination should be made at the time of importation, whether or not the tariff provision in question explicitly requires classification by chief use. [Italics quoted.] *

The rule that use at the time of importation is the controlling consideration has particular and necessary application in the case of a commodity not known to commerce at the time of the enactment of the provision under consideration.

In view of what we have stated to be the meaning of wallboard, it may be presumed that when the collector invoked the provision therefor for the classification of particle board in standard wallboard sizes, he found as a fact that it was included within a class of merchandise chiefly used in the formation of walls, and that determination is, of course, presumptively correct. *Dorward & Sons Co. v. United States*, 40 C. C. P. A. (Customs) 159, C. A. D. 512,

United States v. *Marshall Field & Co.*, 17 C. C. P. A. (Customs) 1, T. D. 43309.

But a presumption is not evidence and may not be weighed against evidence. *Morse Bros. (Inc.)* v. *United States*, 13 Ct. Cust. Appls. 553, T. D. 41432. It requires but a "small degree of competent proof" to overcome it. *Kroger Reubel Co., Inc., and Alltransport, Inc.* v. *United States*, 44 Cust. Ct. 274, C. D. 2186.

The instant record provides considerably more than "a small degree of competent proof" with respect to the chief use of particle board of the dimensions here involved. The evidence is abundant, clear, and convincing that, regardless of dimensions, particle board is not only not used as wallboard, but that it is not suitable for such use. Ten witnesses having direct contact with the sale of particle board, and personal knowledge of its ultimate uses, whose combined experiences embrace every area of the country, positively asserted that particle board had no market in the wallboard trade, and conversely that wallboards were not suited to the ultimate purposes served by particle board. As succinctly stated by the witness Holdsworth

> If they were able to use it, our sales wouldn't be at the level they are now certainly, and if we were able to use our board as a wall material, our sales would be much greater than they are at the present time.

Moreover, we deem it especially significant that the evidence establishes that particle board is not practically nor commercially suitable for wallboard purposes. If it is not economically feasible to substitute particle board for wallboard, and the former does not possess desirable properties for use as wallboard, it is fairly and reasonably inferable that it is not so used to any substantial extent. Chief use in this area of application would seem, therefore, to have been clearly negated.

By reason of the foregoing, we find and hold that whether or not in so-called standard wallboard dimensions, particle board is not wallboard within the contemplation of paragraph 1402, as modified, *supra*. Since it has been established that a synthetic resin is the chief binding agent in the instant as well as in all particle board, the claim of the plaintiff for classification of such merchandise within the provisions of paragraph 1539(b) as modified, *supra*, with the consequent assessment of duty at the rate of 21 cents per pound and 17 per centum advalorem, is sustained.

Judgment will be entered accordingly.

PAUL P. RAO,
J.

Concurring:
LAWRENCE
J.

CONCURRING OPINION

FORD, Judge: Based upon the record herein, I concur with the majority in the result. I, however, do not agree with the majority's interpretation of the case of *United States* v. *The Baltimore & Ohio R.R. a/c United China & Glass Company*, 47 C. C. P. A. (Customs) 1, C. A. D. 719.

In the case of merchandise, such as is involved herein, which came into existence after the passage of the Tariff Act of 1930, it is obvious that proof of chief use at the time of the passage of the act is not possible. Therefore, chief use at the time of importation is controlling on the principle that tariff acts are intended for the future as well as for the present and will embrace merchandise whose existence was not known to commerce prior to the effective date of the tariff act. *United States* v. *Paul G. Downing*, 16 Ct. Cust. Appls. 556, T. D. 43294; *V. W. Davis* v. *United States*, 16 Cust. Ct. 163, C.D. 1005 (affirmed *sub nom Victor W. Davis, Jr. Administrator, etc.* v. *United States*, 35 C.C. P.A. (Customs) 79, C.A.D. 374; *United States* v. *Geo. Wm. Rueff, Inc.*, 41 C.C.P.A. (Customs) 95, C.A.D. 535.

MORGAN FORD,
J.

Judgment.

UNITED STATES CUSTOMS COURT

SECOND DIVISION

NATIONAL STARCH PRODUCTS, INC., Plaintiff,

vs.

UNITED STATES, Defendant.

Suit No. 60/2-422-60

INDEX INDUSTRIAL CORP., Party in Interest.

This case having been duly submitted for decision to the Second Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED, that the claim of plaintiffs that particle board in sheets, 4 feet by 8 feet, assessed with duty at the rate of 5 per centum ad valorem, pursuant to the provisions of paragraph 1402 of the Tariff Act of 1930, as modified by the Annecy Protocol to the General Agreement on Tariffs and Trade, 84 Treas. Dec. 403, T. D. 52373, supplemented by Presidential Proclamation, 85 Treas. Dec. 116, T. D. 52462, is properly dutiable at the rate of 21 cents per pound and 17 per centum ad valorem, within the provisions of paragraph 1539(b) of said act, as modified by the Sixth Protocol of Supplementary Concesssions to said General Agreement on Tariffs and Trade, 91 Treas. Dec. 150, T. D. 54108, as manufactures wholly or in chief value of a product of which a synthetic resin is the chief binding agent, is sustained.

CHARLES D. LAWRENCE,
PAUL P. RAO,
MORGAN FORD,
Judges of the United States Customs Court

Dated at New York 14, N. Y., this the 18 day of May, 1961.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 26 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1001

NATIONAL STARCH PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST), *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHAPMAN & FRIEDMAN
Attorneys for Party in Interest
932 Pennsylvania Bldg.
Washington 4, D. C.

By: BRUCE E. CLUBB

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Statement	1
Argument	2
The Dual Burden of Proof	3
Was the Burden of Proof Sustained?	9
Conclusion	11

TABLE OF CASES

Arthur v. Dodge, 101 U.S. 34 (1880)	7
Arthur v. Unkart, 96 U.S. 118 (1878)	4
Cary v. Curtis, 44 U.S. (3 How.) 236 (1845)	8
Davies v. Arthur, 96 U.S. 148 (1878)	4, 7
District of Columbia v. Sweeney, 310 U.S. 631 (1940)	10
Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836)	8
Fiedler v. Curtis, 67 U.S. (2 Black) 461 (1863)	8
Heinze v. Miller, 144 U.S. 28 (1892)	7
Herrman v. Robertson, 152 U.S. 521 (1894)	7, 9
Massachusetts v. Mellon, 262 U.S. 447 (1923)	4
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1954)	10
Stark v. Wickard, 321 U.S. 288 (1944)	4
United States v. Salambier, 170 U.S. 621 (1898)	7
United States v. Schwartz & Co., 3 Ct. Cust. App. 24 (1912)	8

STATUTES

Act of February 26, 1845, Ch. 22, 5 Stat. 727	8
Tariff Act of 1864, Ch. 171, Sec. 14, 13 Stat. 202	8
Tariff Act of 1913, Ch. 16, Sec. 3, 38 Stat. 114	9
Tariff Act of 1922, Ch. 356, Sec. 516(b), 42 Stat. 858	9
Tariff Act of 1930	10
19 U.S.C. Sec. 1001	
Para. 1402	1, 5
Para. 1539(b)	1, 2, 3, 5, 9, 10

	Page
19 U.S.C. Sec. 1201	10
19 U.S.C. Sec. 1500	3
19 U.S.C. Sec. 1505	3
19 U.S.C. Sec. 1514	3, 7
19 U.S.C. Sec. 1516	3, 5
19 U.S.C. Sec. 1516(b)	3, 4, 6, 9
19 U.S.C. Sec. 1516(c)	6
Tariff Classification Act of 1962, 76 Stat. 72	10

MISCELLANEOUS

Davis, Administrative Law, Sec. 22.05 (1958)	4
H. Rept. 248, 62d Cong., 1st Sess. (1922)	9
United States Tariff Commission, Tariff Classification Study, Proposed Revised Tariff Schedules of the United States (1960)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

NATIONAL STARCH PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST), *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

On January 5, 1960, Petitioner, National Starch Products, Inc., filed a protest with the Collector of Customs at New York, protesting the Collector's classification of particle board in 4′ x 8′ sizes under Paragraph 1402 of the Tariff Act of 1930 (49 U.S.C. § 1001, Para. 1402 (1958)), alleging instead that such merchandise was properly classifiable under Paragraph 1539(b), as a "manufacture wholly or in chief value of any product of which a synthetic resin or resin-

like substance is the chief binding agent". (R. 1, pp. 5-11). On May 17, 1960, a trial was held and on May 18, 1961, the Customs Court filed an opinion sustaining the protest and holding that particle board in 4' x 8' sizes was properly classifiable under Paragraph 1539(b). (R. 1, pp. 77-90.)

On July 15, 1961, the Party-in-Interest, Index Industrial Corp., filed a petition for review claiming, *inter alia*, that the lower court erred in holding that particle board is classifiable under Paragraph 1539(b). (R. 1, pp. 1, 2) Oral argument was held in the Court of Customs and Patent Appeals on February 9, 1962, and on May 18, 1962, that Court affirmed the Customs Court decision. (R. 11.)

On July 6, 1962, the Party-in-Interest filed a Petition for Rehearing in which it alleged that the Court of Customs and Patent Appeals decision affirming the judgment of the Customs Court was in conflict with a long line of Supreme Court and Court of Customs and Patent Appeals decisions. (R. 12, pp. 1-12.) On December 12, 1962, the Court of Customs and Patent Appeals withdrew its earlier opinion and issued a new one holding, *inter alia*, that particle board is not properly classifiable under Paragraph 1539(b), and since Petitioner had the burden of proving that it is, the judgment of the Customs Court sustaining the Protest was reversed. (R. 28.)

ARGUMENT

Petitioner has noted two grounds upon which it believes that certiorari should be granted. The first relates to the burden of proof required of a plaintiff in a domestic manufacturer's protest action against the collector of customs. The second relates to the ques-

tion of whether that burden was sustained by the plaintiff in this case. It will be shown below that the first point is not only clearly covered by the applicable statute, but also is well settled by prior decisions of this Court which were followed by the Court below. The second point, in addition to having been properly decided by the Court below, is of no conceivable public importance. Accordingly, neither point is a proper ground for granting certiorari.

The Dual Burden of Proof

The first point raised by Petitioner is that the lower court erred when it required a so-called "dual burden of proof" in a suit arising from a protest filed by a domestic manufacturer pursuant to 19 U.S.C. § 1516 (b) (1958).

In order to discuss this point, it is first necessary to determine what is meant by the term "dual burden of proof". Technically, of course, it is the requirement in customs law that one who protests against a classification[1] assigned by a collector of customs, is required to show (1) that the collector's classification is errone-

[1] The amount of customs duty on any product is determined in a two-step process. First, the Appraiser determines the value of the goods (Appraisal) (See, 19 U.S.C. § 1500 (1958)) and second, the Collector determines under which paragraph of the Tariff Act they should be entered (Classification) (See, 19 U.S.C. § 1505 (1958)). The exact amount of duty is then computed (in cases where an ad valorem duty has been imposed) by multiplying the statutory rate for the classification selected by the collector by the value determined by the appraiser. An imposition of duty can be challenged on either ground. (19 U.S.C. §§ 1514, 1516 (1958).) In this case it was challenged by an American manufacturer on the ground that the Collector had classified the importation under Paragraph 1402 as "wallboard", when it should have been classified under Paragraph 1539(b) as a manufacture of a product the chief binding agent of which is synthetic resin.

ous, and (2) that the classification urged by the protestant is correct.[2] In a broader sense, however, it is merely the requirement that a protesting party in a customs case, like the plaintiff in any other suit, show that he has sustained injury.[3] In the case of an American manufacturer's protest, injury can only be shown by proving that the amount of duty exacted by the collector was *too low.* "Too low" being a relative term, it is, of course, necessary to show that a different, and higher, rate ought properly to have been applied. Accordingly, it is said that a protesting party must show not only that the classification of the collector is wrong, but also that the classification urged by the protestant is correct. This then is the "dual burden of proof" of which Petitioner complains.

---

[2] See, e.g., Davies v. Arthur, 96 U.S. 148 (1878); Arthur v. Unkart, 96 U.S. 118 (1878).

[3] In Stark v. Wickard, 321 U.S. 288, 304 (1944), this Court expressed the same thought as follows:

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

Cf., Massachusetts v. Mellon, 262 U.S. 447 (1923).

It appears that if 19 U.S.C. § 1516(b) (1958) were construed as Petitioner suggests that it should be, i.e., so as to allow domestic manufacturers to bring actions to test a collector's classification without showing injury, there would be considerable question about the statute's constitutionality, since no "case or controversy" would be involved. See, 3 Davis, Administrative Law, § 22.05 (1958). In any event, the court need not reach this issue since it is clear that the statute does not allow Petitioner to proceed without showing injury. Therefore, the "case or controversy" question does not arise.

In the case at bar Petitioner protested the Collector's classification of particle board under Paragraph 1402 as being too low, claiming that it was properly dutiable at a much higher rate under Paragraph 1539(b). The Court of Customs and Patent Appeals held that since Petitioner had not shown that the merchandise was properly dutiable under Paragraph 1539(b), it was not necessary to reach the question of whether the Collector's classification was in error. Petitioner now asks certiorari on the theory that it did not have the burden of proving that Paragraph 1539(b) was the proper classification.

Petitioner concedes that the "dual burden of proof", or injury concept, has always properly been applied to importer's suits, but argues (1) that the requirement is not applicable to protests by domestic manufacturers, and (2) that the Supreme Court has never passed on this point. It is clear, however, from the applicable statute and the decisions of this Court that the decision of the Court below was not only clearly correct, but was required by a long line of Supreme Court decisions.

The statute authorizing customs protests by domestic manufacturers[4] requires by necessary inference that a protesting domestic manufacturer both plead and prove the proper rate. This statute provides a three-step procedure. First, the domestic manufacturer must file a complaint with the Secretary of the Treasury; second, he must file a protest with the Collector of Customs; and third, the case is heard by the Customs Court. At each step the plaintiff must allege

[4] 19 U.S.C. § 1516 (1958).

the classification he believes is proper. Thus, the statute provides for the complaint as follows:

> "If such manufacturer . . . believes that the proper rate of duty is not being assessed, *he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief.*" (Emphasis added.)[5]

Later, the statute provides for a protest to be filed as follows:

> "Within thirty days . . . the complainant may file . . . a protest in writing *setting forth a description of the merchandise and the classification and rate of duty he believes proper.*" (Emphasis added.)[6]

Still later, provision is made for settlement of the dispute in the Customs Court.

> "The collector shall transmit the entry and all papers and exhibits accompanying or connected therewith to the United States Customs Court *for due assignment and determination of the proper value or the proper classification and rate of duty.*" (Emphasis added.)[7]

Thus, not only must the proper rate and classification be alleged in all the plaintiff's pleadings, but also the whole purpose of the procedure is to determine what the proper rate is. Certainly, one who is required to allege the proper rate in his pleadings is required to prove it as well, for otherwise there would be no point

---

[5] Id. § 1516(b).

[6] Ibid.

[7] Id. § 1516(c).

in alleging it in the first instance. If seems, therefore, that Petitioner's first contention, i.e., that the plaintiff in such an action does not have the burden of proving the proper rate and classification, is not supported by the statute. On the contrary, the statute appears to compel the opposite conclusion.

Petitioner also contends that the Supreme Court has never decided this issue, but this contention is equally without merit. This court has many times held the dual burden requirement applicable to importer's protest suits, and the purposes for applying it are equally as applicable in a suit by a domestic manufacturer.[8] This Court has repeatedly held that the reason that an importer is required to both allege and prove the proper rate (in spite of the fact that it is not literally required by the statute),[9] is to apprise the collector of the objections entertained by the importer, before it is too late to remove them, and to hold the importer to the objections which he then contemplated and on which he really acted.[10] Thus, the reasons for impos-

[8] Moreover, many of the decisions of this court requiring a dual burden of proof in importers' protest actions were rendered during the 1864-1912 period when the protests of importers and domestic manufacturers were brought under the same statute. See note 10, infra.

[9] The importer's protest is authorized by 19 U.S.C. § 1514 (1958) which provides in pertinent part that the importer must "file a protest in writing with the collector setting forth distinctly and specifically . . . the reasons for the objection . . ." to the collector's decision. This language has been held to require that the proper rate be alleged in the protest, and the importer has been held to the claims made in the protest. Davies v. Arthur, 96 U.S. 148 (1878).

[10] Herrman v. Robertson, 152 U.S. 521 (1894); Davies v. Arthur, 96 U.S. 148 (1878). See also, Arthur v. Dodge, 101 U.S. 34 (1880); Heinze v. Miller, 144 U.S. 28 (1892); United States v. Salambier, 170 U.S. 621 (1898).

ing a dual burden were completely unrelated to whether the plaintiff was an importer or a domestic manufacturer. Is it any less necessary that the Collector be given an opportunity to change his practice when the protesting party is a domestic manufacturer instead of an importer? Is it any less necessary that the protestant be held to those objections which he contemplated at the time of his protest when he is a domestic manufacturer instead of an importer? If any reasons for such discrimination exist they are not suggested by the statute, by existing court decisions, or by the Petition in this case. On the contrary, the only material difference between the two suits appears to be that in one the importer is asking for a lower rate and in the other the domestic manufacturer is asking for a higher rate. Otherwise the actions are the same,[11] and the Court below properly applied the same burden of proof.

---

[11] In fact, the domestic manufacturer's protest appears to have grown out of the importer's protest. Originally, importers brought actions in assumpsit against the collector for money had and received on the theory that the collector had exacted excessive duties from them. (See the discussion in Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836).) Later, for reasons unconnected with the substance of the action (See, Carry v. Curtis, 44 U.S. (3 How.) 236 (1845); Fiedler v. Curtis, 67 U.S. (2 Black) 461 (1863), it was provided for by statute. (Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.) Later still, the wording of the act was changed such that an importer who was "dissatisfied" with a decision of the collector could protest it (Tariff Act of 1864, ch. 171, § 14, 13 Stat. 202), and the domestic producer's action was first brought under this language. The domestic producer imported a token shipment of his foreign competitor's product, thereby becoming an "importer", and then protested the assessment of duties thereon, announcing that he was "dissatisfied", not because the duty was too high, but rather because it was too low. See the discussion of this problem in United States v. Schwartz & Co., 3 Ct. Cust. App. 24 (1912). Thus, at this point, the protests of the importer and the domestic

Was the Burden of Proof Sustained?

The second point raised by Petitioner appears to be that, assuming that the dual burden is applicable to actions by domestic manufacturers, then certiorari should be granted because the Court of Customs and Patent Appeals erred in holding that Petitioner had not sustained its burden of proof.

There are at least four reasons why certiorari should not be granted on this issue. First, the Court below correctly decided this issue, and Petitioner's argument to the contrary is based upon Respondent's alleged failure to argue issues which were not before the Court[12] and concessions which were not made.[13] Second,

---

manufacturer were both authorized by the same statute, and decisions of this court such as Herrman v. Robertson, 152 U.S. 521 (1894), requiring a dual burden of proof applied equally to both. In 1913, however, the language of the act was changed such that only protests alleging duties were too high were allowed. (Tariff Act of 1913, ch. 16, § 3, 38 Stat. 114.) In 1922 a new section was added specifically providing for protests to be filed by domestic manufacturers. (Tariff Act of 1922, ch. 356, § 516(b), 42 Stat. 858.) The stated purpose of the new section was to restore the "right of protest against the rate or amount of duty as being too low" which was in the law prior to 1913. H.R. Rep. No. 248, 62d Cong., 1st Sess. 25 (1922). The language of this section has remained substantially the same to the present day. 19 U.S.C. § 1516(b) (1958).

[12] Petitioner states: "Respondent did not challenge the correctness of the collector's general classification of particle board under 1539(b), . . ." Petition, p. 13. This is true. The issue before the Court was the proper classification of particle board in 4 x 8 sizes. Respondent could only deal with that issue. Accordingly, Respondent, even if it had wanted to, could not have "challenged the collector's general classification of particle board."

[13] Petitioner states: "Respondent . . . conceded that the merchandise in question was particle board of the type which the collector [classified under Paragraph 1539(b)] . . ." Petition, p. 13. As authority for this proposition Petitioner cites "R. 1—p. 76; Appendix B hereto, *infra*, pp. xxxi-xxxii." The pages cited do not contain the concession described by Petitioner, nor as far as Respondent can determine, does the rest of the Record.

even if the Court below had erred, certiorari should not be granted merely for the purpose of making the largely factual inquiry of whether or not one of the parties has sustained its burden of proof. Third, to the extent that construction of a statute is involved, it relates to an issue having application only to an obscure section of the Tariff Act of 1930. (19 U.S.C. § 1001, Para. 1539(b) (1958)). Fourth, the paragraph of the Tariff Act of 1930, the construction of which is requested, together with the rest of Titles I and II of the Tariff Act of 1930, has already been superseded[14] and will probably become inoperative before this case could be decided by this court. Since the new Act which will replace the Tariff Act of 1930 contains a specific provision for particle board,[15] any decision on this issue by this court could apply only to this case. Accordingly, under the principles enunciated in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954) and *District of Columbia* v. *Sweeney*, 310

---

[14] The Tariff Classification Act of 1962 (Pub. L. 87-456, 87th Cong., 76 Stat. 72, May 24, 1962), provides in part as follows:

> "Sec. 101. (a) The Tariff Act of 1930, as amended, is amended by striking out titles I and II (19 U.S.C. 1001 and 1201) and . . . by substituting in lieu thereof a new title I entitled 'Title I—Tariff Schedules of the United States'."

The new Title I is made up of the headnotes, appendix and schedules one to eight of the Tariff Commission publication entitled "Tariff Classification Study, Proposed Revised Tariff Schedules of the United States" and its supplements. The new Title I contains a specific designation for wood particle board (Schedule 2, Item 245.50), and, therefore, the question of whether the "wallboard" classification of particle board is, or is not, an exception to a general classification of all particle board under Paragraph 1539(b) will not be involved in the new Title.

[15] See note 14, *supra*.

U.S. 631 (1940), certiorari should be denied because the question is not of public importance.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

INDEX INDUSTRIAL CORPORATION,
PARTY IN INTEREST

Respondent

CHAPMAN & FRIEDMAN
Attorneys for Party in Interest
932 Pennsylvania Bldg.
Washington 4, D. C.

By: BRUCE E. CLUBB

Dated:
Washington, D. C., April 26, 1963

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by causing a copy thereof to be mailed via first-class mail, postage prepaid, properly addressed to each such party, as listed below:

Charles M. Price, Esq.
Thaddeus S. Snell, Esq.
Robert W. Wright, Jr., Esq.
Spray, Price, Townsend & Cushman
134 South LaSalle Street
Chicago 3, Illinois

Solicitor General
Department of Justice
Washington, D. C.

Alan S. Rosenthal, Esq.
Department of Justice
Washington, D. C.

Assistant Attorney General, Customs Section
201 Varick Street
New York, New York

Dated: April 26, 1963
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1001

NATIONAL STARCH PRODUCTS, INC., PETITIONER

v.

UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was brought in the United States Customs Court by petitioner, an American producer of a wood product known as "particle board", under the provisions of Section 516(b) of the Tariff Act of 1930, as amended, 19 U.S.C. 1516(b). The basis of the suit was that the Collector of Customs had erroneously classified importations of particle board as "wallboard", dutiable under paragraph 1402 of the Act, as modified, at the rate of 5 per centum, ad valorem. Petitioner's contention was that the im-

portations should have been classified as manufactures wholly or in chief value of a product of which any synthetic resin or resin-like substance is the chief binding agent, dutiable under paragraph 1539(b), as modified, at the rate of 21 cents per pound and 17 per centum ad valorem.

The Customs Court sustained petitioner's position, and on May 18, 1962 the Court of Customs and Patent Appeals affirmed. On rehearing, however, the latter court withdrew its opinion of affirmance and on December 12, 1962 filed a new opinion, unanimously reversing the judgment of the Customs Court. The basis of its ruling was (1) that petitioner had the burden of establishing both the propriety of its asserted classification and the erroneousness of the classification applied by the Collector of Customs; and (2) that petitioner had failed to meet the first part of this dual burden.

The United States did not actively participate in the proceedings in either of the courts below and did not itself appeal from the judgment of the Customs Court. In the case of protests filed by American producers under Section 516(b) of the Tariff Act, the importer of the merchandise in issue has a statutory right to appear and be heard as the party in interest. Section 516(c), 19 U.S.C. 1516(c). Here, the importer (respondent Index Industrial Corporation) exercised this right in the Customs Court and took the appeal from the adverse decision of that court. In the opinion of the Department of Justice, the position of the Government was being adequately presented by the party in interest and, therefore, it

was not necessary for the Department itself to participate.

We believe, however, that, in connection with the pending petition for certiorari, this Court may wish a brief statement of the reasons why, in the Government's view, this case is inappropriate for review by this Court.

1. The ultimate question as to the appropriate classification of the particle board here involved is narrow, of no general importance, and particularly suitable for final resolution by the specialized courts charged with the responsibility for the interpretation of the Tariff Act. Moreover, the question is of no prospective significance since both of the competing paragraphs were repealed by Section 101 (a) of the Tariff Classification Act of 1962, 76 Stat. 73. The new dutiable list provided by that Act contains a specific designation for wood particle board.

2. There is no substance to petitioner's contention that, in an action under Section 516(b) of the Tariff Act, the American producer need establish only that the classification utilized by the Collector was erroneous. As petitioner correctly recognizes, an importer who files a protest against the Collector's classification must additionally establish that the classification upon which it relies is correct. There is no reason for attributing to Congress an intent that the American producer's burden should be less.

In this regard, petitioner's reliance on the terms of Section 516(b) is clearly misplaced. As a condition precedent to filing a protest in the Customs Court, the American producer must file a complaint

with the Secretary of the Treasury, setting forth, *inter alia*, "the classification, and the rate or rates of duty he believes proper, and the reasons for his belief." It is scarcely likely that Congress would have imposed this requirement had it deemed the American producer's burden in the Customs Court, following the denial of the complaint by the Secretary, to be limited to a showing that the Collector's classification was in error.

There is a still more fundamental consideration requiring the conclusion that the American producer, in common with the protesting importer, must be held to the burden of establishing the appropriateness of a specific classification other than which was selected by the Collector. The gravamen of the American producer's complaint is perforce that the duties assessed against competing imported merchandise were too low; just as a suit by an importer necessarily is based upon the alleged exaction of excessive duties. The mere showing by the complaining American producer (or importer) that the Collector's classification was erroneous does not, however, in itself prove that higher (or lower) duties should have been assessed; this cannot be ascertained until the correct classification (and thus rate of duty) have been established. It is for this reason that this Court held in *Arthur* v. *Unkart*, 96 U. S. 118, upon which petitioner relies (Pet. p. 9), that the complaining importer must prove the applicability of a classification providing a lower rate of duty than that specified in the classification held applicable by the Collector. For the same reason, an essential element of the

American producer's proof is that the merchandise comes under a classification calling for a higher rate of duty than that imposed by the Collector.

3. Nor is there merit to petitioner's alternative contention that the court below erred in holding that it had failed to fulfill the burden of proving the applicability of paragraph 1539(b) to the particle board in issue. This contention is based principally upon the purported failure of the court to give effect to the settled principle that a presumption of correctness attaches to the Collector's classification of merchandise. See *e.g.*, *Arthur* v. *Unkart*, *supra*; *United States* v. *John A. Steer Co.*, 46 C.C.P.A. (Customs) 132, 134.

Contrary to petitioner's apparent belief, the presumption of correctness is directed solely to the decision of the Collector respecting the classification of the merchandise in issue; *viz.*, the administrative action under review. Here that decision was that the merchandise was classifiable as wallboard under paragraph 1402, because it was particle board of a type which, under prior Bureau of Customs rulings, was excepted from classification under paragraph 1539 (b). Far from relying on a presumption of the correctness of the Collector's conclusion, petitioner's entire case was based upon the assertion that that conclusion was erroneous.

As we have noted, to sustain its position (*i.e.*, to *overcome* the presumption of correctness attaching to the Collector's classification under paragraph 1402) petitioner had to establish, *inter alia*, the applicability of paragraph 1539(b) to the particular particle board

involved. To carry this burden, it was required to show affirmatively that the importation was, in the terms of paragraph 1539(b), a manufacture wholly or in chief value of any product of which synthetic resin is the chief binding agent. As the court below held, petitioner totally failed to establish that the importation was a "manufacture" of particle board (the "product"). This holding is not challenged by petitioner, which contends simply that it was not obligated to make the showing.

For the foregoing reasons, we believe that the petition should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

May 1963

LIBRARY

Office-Supreme Court, U.S.
FILED
MAY 3 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1001

NATIONAL STARCH PRODUCTS, INC.,
Petitioner,

vs.

THE UNITED STATES (INDEX INDUSTRIAL CORP., Party In Interest),
Respondent.

REPLY TO PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES M. PRICE,
THADDEUS S. SNELL,
ROBERT W. WRIGHT, JR.,
Attorneys for Petitioner.

Of Counsel:
SPRAY, PRICE, TOWNSEND & CUSHMAN,
134 S. LaSalle St.,
Chicago 3, Illinois,
RA 6-9000.

THE BLAKELY-HARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1001

NATIONAL STARCH PRODUCTS, INC.,

Petitioner,

vs.

THE UNITED STATES (INDEX INDUSTRIAL CORP., Party In Interest),

Respondent.

REPLY TO PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Petition For Writ of Certiorari was filed on April 9, 1963. On April 26, 1963, the party in interest, Index Industrial Corp., filed a brief in opposition to the petition. While the other respondent, The United States of America, has not yet filed a brief, petitioner desires to reply to certain points raised in the brief which has been filed.

ARGUMENT.

The questions presented are stated on page 2 of the petition.[1]

1. THE DUAL BURDEN OF PROOF.

The party in interest asserts that certiorari should not be granted because the "dual burden of proof" is "clearly covered" by the applicable statute and "well-settled by prior decisions of this Court" (Br. p. 3). However, there is no such express provision in the statute[2] nor does party in interest cite any such prior decisions of this Court. Its contentions are clearly erroneous as shown by its own arguments.

By way of argument, the party in interest asserts that the dual burden is based upon a "necessary *inference*" in the statute. The party in interest lifts certain statutory passages out of context as support for this "necessary inference" (Br. pp. 5-6). The fact that the statute[3] provides that an American producer "*may*" protest *both* the

---

1. "QUESTIONS PRESENTED

"1. Whether an American producer in a protest suit under Section 516(b) of the Tariff Act of 1930, 19 U. S. C. Sec. 1516(b), has the dual burden not only of proving that the collector's classification of the merchandise in question is erroneous but also of establishing the correct classification under that Act.

"2. Whether an American producer, assuming that it does have a dual burden of proof in a protest suit under Section 516 (b) of the Tariff Act of 1930, is entitled to rely on the presumption of correctness of an applicable general classification under which the merchandise in question is classified by the Customs Bureau if an *eo nomine* exception for the particular merchandise in question is shown to be erroneous."

2. 19 U. S. C. §1516(b) (reprinted in Pet. App. A, p. iv).

3. Ibid.

classification and rate or rates of duty does not support any such inference because the statute also provides that a protestant may "protest the classification of, *or* rate of duty imposed upon, such merchandise"[4] (Italics supplied). Finally, the party in interest overlooks the language of the statute which contemplates that a protest may be sustained "in whole or in part."[5] These points are discussed more fully on pages 10 and 11 of the petition and refutes the "necessary inference" contended for by the party in interest.

The party in interest also seeks to inject a statutory requirement that an American producer must show injury (Br. p. 4). Again, the statute[6] contains no such requirement. As petitioner points out (Pet. p. 11) the effect of an American producer's protest is entirely prospective. It is more in the nature of a declaratory judgment action than a suit to redress injury.

The statutes[7] authorizing protests by importers and American producers are different both in purpose and effect as discussed more fully in the Petition (pp. 9-10). Accordingly, the cases cited by the party in interest (Br. pp. 7-8), which involve only importer's protests, are not applicable to this case.

Nevertheless, the propriety of granting certiorari is made even clearer by the party in interest's brief. The "dual burden of proof" is a judicial rule which this Court adopted as necessary to the proper administration of protest suits brought by importers.[8] This Court has never

4. 19 U. S. C. § 1516(b) (Reprinted in Pet. App. A. p. iv).

5. Ibid.

6. Ibid.

7. 19 U. S. C. §§1514, 1515 & 1516(b) (reprinted in Pet. App. A. pp. ii-vi).

8. *Arthur* v. *Unkart*, 96 U. S. 118 (1877).

reviewed the separate and distinct statute[9] which authorizes an American producer's protest and the question of whether such a judicial rule should be adopted in such suits is at least as significant to the administration of the Customs laws as it was in connection with suits brought by importers.

2. WAS THE COLLECTOR'S CLASSIFICATION UNDER PARAGRAPH 1539(b) PRESUMPTIVELY CORRECT?

The party in interest has missed the point of the second question presented in the petition. This question does not involve a "largely factual inquiry" (Br. p. 10): rather, it raises the basic legal question, applicable to all protest suits, of whether a protestant can rely on the presumption of correctness which attaches to the collector's classification of merchandise as would seem to be required by the decision of this Court in *Arthur* v. *Unkart*, 96 U. S. 118 (1877) and by the statute (19 U. S. C. Sec. 1502; Pet. App. A, p. i).

The party in interest's statement that it had no standing, in the Customs Court, to challenge the collector's general classification of particle board under paragraph 1539(b) (19 U. S. C. Sec. 1001) (Br. p. 9, n. 12) is wholly without merit. That classification was indisputably established in the case and the statute clearly gives the party in interest

> "* * * the right to appear and to be heard as a party in interest before the United States Customs Court * * *"[10]

Finally, the party in interest's brief (Br. p. 10) erroneously states that this question involves the construction of "an obscure section of the Tariff Act of 1930" (par. 1539 (b) *supra*) which has "already been superseded" by the

9. 19 U. S. C. §1516(b).

10. 19 U. S. C. §1516 (c).

Tariff Classification Act of 1962[11] and that the question is therefore not of public importance. The construction of par. 1539(b) is not an issue before this Court. This question applies to any protest suit (either by an importer or an American producer) and will continue to be one of broad significance when the new Tariff Schedules are made effective under the Tariff Classification Act of 1962.

3. THE TARIFF CLASSIFICATION ACT OF 1962.

The possible effect of a decision of this Court, in this case, under the Tariff Classification Act of 1962 is real and substantial. Contrary to the suggestion of the party in interest (Br. p. 10) reversal of the decision of the Court of Customs and Patent Appeals would require a change in the proposed new rate of duty on particle board under Sec. 202 of that Act.[12]

The new Tariff Schedules may go into effect within the

---

11. P. L. 87-456, 76 Stat. 72.

12. "TARIFF CLASSIFICATION ACT OF 1962."

* * * * *

"PUBLIC LAW 87-456; 76 STAT. 72."

* * * * *

"TITLE II—ADMINISTRATIVE AND SAVING PROVISIONS."

* * * * *

"Sec. 202. (a) This Act shall not divest the courts of their jurisdiction over a protest filed * * * by an American manufacturer, producer, or wholesaler under section 516(b) of such Act * * * before the effective date of the Tariff Schedules of the United States."

* * * * *

"Sec. 202. (c) * * * If such a protest is sustained in whole or in part by a final judicial decision, * * * the Commission shall report to the President such changes in the Tariff Schedules of the United States as the Commission decides are necessary to conform them to the fullest practicable extent to the substance of such final decision. The President shall, as soon as practicable, proclaim such changes. * * *"

next few months, and it would be a practical impossibility to file a new protest within that time because of the time consumed by the preliminary steps required under the statute (19 U. S. C. §1516(b)). Thus, if the decision of the court below is in fact erroneous and contrary both to the decision of this Court and the statute (19 U. S. C. §1502), the error may well be perpetuated in the new Tariff Schedules, unless certiorari is granted and the error corrected.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. PRICE,
THADDEUS S. SNELL,
ROBERT W. WRIGHT, JR.,
Attorneys for Petitioner.

Of Counsel:
SPRAY, PRICE, TOWNSEND & CUSHMAN,
134 S. LaSalle St.,
Chicago 3, Illinois,
RA 6-9000.